THE RECORD
OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

EDITORIAL BOARD

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Association Activities

AT THE STATED MEETING on January 15 the Committee on the Bill of Rights, George S. Leisure, Chairman, presented a report on Radio and Television Broadcasting of Hearings of Congressional Investigating Committees, and proposed the following resolution:

> RESOLVED, that The Association of the Bar of the City of New York recommends to the Congress of the United States the adoption of a Resolution, concurrent or otherwise, prohibiting the broadcasting, by radio or television, of the proceedings at a public hearing held by a congressional investigating committee at which witnesses testify involuntarily under the compulsion of a congressional subpoena, and prohibiting the taking of motion pictures or other photographs during the course of such hearing.

After considerable debate the meeting refused to approve the resolution.

Interim reports from the following Committees were postponed to the March meeting: Committee on the Domestic Re-

lations Court, Sylvia Jaffin Singer, Chairman; Joint Committee on Legal Referral Service, Orison S. Marden, Chairman; Committee on Medical Jurisprudence, Edmund T. Delaney, Chairman; and Committee on the Municipal Court of the City of New York, William G. Mulligan, Chairman.

ON JANUARY 11 the Special Committee on Tax Problems of the Professions, Roswell Magill, Chairman, entertained representatives of over thirty national and local organizations interested in supporting bills pending in Congress which would permit self-employed persons to establish pension systems. The meeting was addressed by George Roberts, Chairman of the American Bar Association's Committee on Retirement Benefits for Lawyers.

CHIEF JUDGE JOHN C. KNOX of the United States Court was the guest of the Committee on Courts of Superior Jurisdiction, Albert R. Connelly, Chairman. Chief Judge Knox expressed his approval of suggestions previously made by the Committee which have been incorporated in the proposed new local rules for the Southern and Eastern Districts. Judge Knox also discussed with the Committee the possibility of a more liberal use of pre-trial procedures, and the Committee expects soon to prepare a report on the operation of the pre-trial calendar.

THE ENTERTAINMENT Committee's Twelfth Night Serenade to Harrison Tweed was played to a capacity house. In addition to a number of lively skits produced by the Committee and professional entertainers, Mr. Tweed, accompanied by an engaging horse and an amiable milkman, sang with feeling and appropriate gestures the well-known aria "With or Without A Legal Degree" from the Fifth Annual Association Night Show "One for the Book." Boris Kostelanetz is Chairman of the Entertainment

Committee and Judge Arthur Markewich acted as Master of Ceremonies for the show. The Seventh Annual Association Night show will be held on April 23, 24, and 25.

AT ITS November meeting the Committee on Foreign Law, Dudley B. Bonsal, Chairman, entertained as guests of the Committee Richard Paulig, Consul of Western Germany and Franz Leitner, Consul of Austria. Topics discussed at the meeting were the Committee's spring forum on the immunity of a foreign sovereign when engaged in commercial enterprises; foreign law questions involved in the implementation of commercial treaties; and procedures relating to interrogatories in a foreign language.

THE CHAIRMAN of the Committee on Medical Jurisprudence, Edmund T. Delaney, Chairman, with Harold Riegelman, Chairman of the Coordinating Committee on Alcoholism, discussed with Governor Dewey legislation relating to the care of alcoholics to be presented to the new session of the Legislature. The Governor's message to the Legislature suggested appropriations of $100,000 for an extension of the clinic program and $45,000 for research.

THE COMMITTEE on Bankruptcy and Corporate Reorganizations, Edmund Burke, Jr., Chairman, had under consideration amendments to Chapter XI of the Bankruptcy Act. These proposed amendments are embodied in H.R. 5064 now before the Congress.

THE THIRD in the series of lectures sponsored by the Committee on Post-Admission Legal Education, Ralph M. Carson, Chairman, delivered by John F. X. Finn on January 10, is published in this number of THE RECORD. On February 19 Miles F.

McDonald, District Attorney for Kings County, will deliver the fourth lecture on "The Public, The Lawyer, and The Criminal Law."

NEARLY ONE thousand members of the bar and insurance company executives attended a meeting held at the House of the Association on January 14, called by the Justices of the Supreme Court of the First Department and the Presidents of The Association of the Bar, New York County Lawyers' Association, and the Bronx County Bar Association. The meeting was addressed by Presiding Justice David W. Peck, who discussed ways of expediting the disposition of personal injury cases. Judge Peck recommended as a course for immediate action bringing cases into the courts in which they belong, being ready for trial when cases are reached, waiver of juries, and the settling of cases whenever justifiable.

JUDGE ROBERT P. PATTERSON at the Stated Meeting on January 15 offered the following resolution commending F. W. H. Adams and his associates for their successful prosecution of disciplinary actions against Harry Sacher and Abraham J. Isserman in the United States District Court for the Southern District of New York:

> WHEREAS, upon the termination of the trial of the Communist Party leaders in the United States District Court for the Southern District of New York, Harry Sacher and Abraham J. Isserman, both of counsel for the defendants, were found in contempt and punished by order of Judge Harold R. Medina; and
>
> WHEREAS, public interest and the orderly administration of justice required prompt prosecution by the Association in the Courts of disciplinary proceedings against Harry Sacher and Abraham J. Isserman; and
>
> WHEREAS, the President and the Chairman of the Ex-

ecutive Committee were authorized to designate Counsel to represent the Association in such proceedings; and

WHEREAS, Mr. F. W. H. Adams was so designated and agreed to act as the Association's Counsel and carried the proceedings in the United States District Court for the Southern District of New York to a successful conclusion with the greatest professional skill; now, therefore, be it

RESOLVED, that The Association of the Bar of the City of New York by a special vote of commendation expresses its gratitude to Mr. F. W. H. Adams for contributing in the highest tradition of the Bar to the elevation of the standards of integrity, honor and courtesy in the legal profession and to the preservation of the ideal of equal justice under law; and be it

FURTHER RESOLVED, that the Association records its appreciation of the valuable services of Mr. Frank H. Gordon, Attorney-in-Chief of the Association's Grievance Committee, Mr. William C. Scott and Mr. Philip C. Smith in assisting Mr. Adams in the preparation and trial of the aforementioned proceedings.

Mr. Sacher was disbarred and Mr. Isserman suspended for two years.

In his memorandum of decision Judge Carroll C. Hincks wrote, "And thanks are particularly due to the petitioners' counsel who has carried the great burden of prosecuting the petition with vigor, thoroughness and fairness. Truly, the assumption and performance of that unpleasant task was a service in keeping with the highest traditions of the legal profession which deserves the gratitude of the entire Bar and the unqualified commendation of the Court."

THE COMMITTEE on Real Property Law, Lewis M. Isaacs, Jr., has recommended to the Legislature a number of amendments to the Civil Practice Act and the Emergency Commercial and Business

Space Rent Control Law. The Committee is also recommending to the Legislature the enactment of amendments to the Civil Practice Act which would extend the provisions of Section 1444-a so as to impose a penalty in every case upon a landlord where an eviction is improperly effected under the rent laws.

SENOR TOMAS GISTAU and Senor Roberto Reyes were special guests of the Association at the Stated Meeting on January 15. Senor Gistau is Secretary of the General Council of the Colleges of Lawyers of Spain, the national bar association of Spain, and Senor Reyes is a member of the Executive Council and also a Deputy of the Madrid Bar Association. Both the guests brought greetings from the Spanish and Madrid Bar Associations and extended a cordial invitation to the meeting of the International Bar Association which will be held in Madrid from July 16–23, 1952.

THE FOLLOWING publishers of law lists and legal directories have received from the Standing Committee on Law Lists of the American Bar Association certificates of compliance with the Rules and Standards as to Law Lists, as to their 1952 editions.

Commercial Law Lists

A. C. A. List (October, 1951–1952 Edition)
Associated Commercial Attorneys List
165 Broadway
New York City 6

American Lawyers Quarterly
The American Lawyers Company
1712 N.B.C. Building
Cleveland 14, Ohio

B. A. Law List
The B. A. Law List Company
161 West Wisconsin Avenue
Milwaukee 3, Wisconsin

Commercial Law Lists—continued

Clearing House Quarterly
Attorneys National Clearing House Co.
1645 Hennepin Avenue
Minneapolis 3, Minnesota

The Columbia List
The Columbia Directory Company, Inc.
320 Broadway
New York City 7

The Commercial Bar
The Commercial Bar, Inc.
521 Fifth Avenue
New York City 17

C-R-C Attorney Directory
The C-R-C Law List Company, Inc.
50 Church Street
New York City 7

Forwarders List of Attorneys
Forwarders List Company
38 South Dearborn Street
Chicago 3, Illinois

The General Bar
The General Bar, Inc.
36 West 44th Street
New York City 18

International Lawyers Law List
International Lawyers Company, Inc.
33 West 42nd Street
New York City 18

The National List
The National List, Inc.
75 West Street
New York City 6

Rand McNally List of Bank Recommended Attorneys
Rand McNally & Company
536 South Clark Street
Chicago 5, Illinois

Wright-Holmes Law List
Wright-Holmes Corporation
225 West 34th Street
New York City 1

General Legal Directory

Martindale-Hubbell Law Directory
Martindale-Hubbell, Inc.
One Prospect Street
Summit 1, New Jersey

General Law Lists

American Bank Attorneys
American Bank Attorneys
18 Brattle Street
Cambridge 38, Massachusetts

The American Bar
The James C. Fifield Company
121 West Franklin
Minneapolis 4, Minnesota

The Bar Register
The Bar Register Company, Inc.
One Prospect Street
Summit 1, New Jersey

Campbell's List
Campbell's List, Inc.
905 Orange Avenue
Winter Park, Florida

Corporation & Administrative Lawyers Directory
Central Guarantee Company, Inc.
141 Jackson Boulevard
Chicago 4, Illinois

International Trial Lawyers
Central Guarantee Company, Inc.
141 West Jackson Boulevard
Chicago 4, Illinois

The Lawyers Directory
The Lawyers Directory, Inc.
916–917 Union Central Building
Cincinnati, Ohio

The Lawyers' List
Law List Publishing Company
111 Fifth Avenue
New York City 3

Russell Law List
Russell Law List
10 East 40th Street
New York City 16

Insurance Law Lists

Best's Recommended Insurance Attorneys
Alfred M. Best Company, Inc.
75 Fulton Street
New York City 7

The Insurance Bar
The Bar List Publishing Company
State Bank Building
Evanston, Illinois

The Underwriters List
Underwriters List Publishing Company
519 Main Street
Cincinnati, Ohio

Probate Law Lists

Recommended Probate Counsel
Central Guarantee Company, Inc.
141 West Jackson Boulevard
Chicago 4, Illinois

Sullivan's Probate Directory
Sullivan's Probate Directory, Inc.
84 Cherry Street
Galesburg, Illinois

State Legal Directories

The following state legal directories published by
The Legal Directories Publishing Company
1072 Gayley Avenue
Los Angeles 24, California

Delaware-Maryland-New Jersey Legal Directory
Florida-Georgia Legal Directory
Illinois Legal Directory
Indiana Legal Directory
Iowa Legal Directory
Kansas Legal Directory
Missouri Legal Directory
Mountain States Legal Directory (for the States of Colorado, Idaho, Montana, New Mexico, Utah and Wyoming)
Ohio Legal Directory
Oklahoma Legal Directory
Pacific Coast Legal Directory (for the States of Arizona, California, Nevada, Oregon and Washington)
Pennsylvania Legal Directory
Texas Legal Directory
Wisconsin Legal Directory

Foreign Law Lists

Canadian Credit Men's Commercial Law and Legal Directory
Canadian Credit Men's Trust Association, Ltd.
456 Main Street
Winnipeg, Manitoba, Canada

Canadian Law List
Cartwright & Sons, Ltd.
24 Adelaide Street, East
Toronto, Ontario, Canada

Empire Law List
Butterworth & Co. (Publishers) Ltd.
4, 5, & 6 Bell Yard, Temple Bar
London, W. C. 2, England

The International Law List
L. Corper-Mordaunt & Company
Pitman House
Parker Street
London, W. C. 2, England

Kime's International Law Directory
Kime's International Law Directory, Ltd.
4 New Zealand Avenue
London, E. C. 1, England

THE FEDERAL Bureau of Investigation is now accepting applications for positions of Special Agent and Special Agent (Accountant). Entrance salary is $5,500, with provision for a pension at the age of fifty. Application forms and further information may be secured from the Federal Bureau of Investigation, 607 United States Court House, Foley Square.

THE NEW SCHOOL for Social Research announces a course on the American Constitution, its history and theory, by Edward S. Corwin, professor emeritus, Princeton University, one of the world's leading authorities on the American government. The course, which runs for fifteen weeks, begins Tuesday, February 5, 6:20

P.M. and because of its importance may be taken without fee by students registered in any other New School course.

Among the special topics to be discussed are the roots of American constitutionalism; establishment of judicial review; Supreme Court theories of the Union before the Civil War; the commerce clause and national power; the Supreme Court and the 14th Amendment; the constitutional law of foreign relations.

The Calendar of the Association
February and March

(As of January 30, 1952)

February	4	Dinner Meeting of Committee on Federal Legislation "For Bench and Bar radio program, WNYC-FM (93.9 megacycles), 8:30 P.M., "Legal Aspects of the Controlled Materials Plan (CMP) under the N.P.A., and Industry's problems under the CMP" Meeting of Committee on Military Affairs Meeting of a Subcommittee of Committee on Law Reform
February	5	Meeting of Committee on State Legislation "On Trial"—Television Program, WJZ-TV (Channel 7), 9:30 P.M.
February	6	Dinner Meeting of Executive Committee Meeting of Section on Wills, Trusts and Estates
February	7	Dinner Meeting of Committee on Criminal Courts, Law and Procedure Meeting of Special Committee on Jurisdiction of Association Meeting of Section on Taxation
February	11	"For Bench and Bar" radio program, WNYC-FM (93.9 megacycles), 8:30 P.M., "Pre-trial Practice in the Federal Courts"
February	12	Meeting of Committee on State Legislation "On Trial"—Television Program, WJZ-TV (Channel 7), 9:30 P.M.
February	13	Dinner Meeting of Committee on Bankruptcy Dinner Meeting of Committee on Military Justice Dinner Meeting of Committee on Surrogates' Courts
February	14	Dinner Meeting of Committee on Criminal Courts, Law and Procedure Dinner Meeting of Committee on Municipal Court
February	15	Dance—Auspices Committee on Entertainment

February 18 Meeting of Section on Drafting of Legal Instruments
Dinner Meeting of Committee on Law Reform
Meeting of Library Committee
Dinner Meeting of Committee on Professional Ethics
Dinner Meeting of Committee on Courts of Superior Jurisdiction
"For Bench and Bar" radio program, WNYC-FM (93.9 megacycles), 8:30 P.M., "Corporate Securities and the Commercial Code"

February 19 Lecture by The Honorable Miles F. McDonald, District Attorney, Kings County, 8:00 P.M. *Buffet Supper, 6:15 P.M.*
Meeting of Committee on State Legislation
"On Trial"—Television Program, WJZ-TV (Channel 7), 9:30 P.M.

February 20 Meeting of Committee on Admissions
Meeting of Committee on Foreign Law
Dinner Meeting of Committee on Insurance Law
Meeting of Section on Labor Law
Dinner Meeting of Committee on Municipal Affairs

February 21 Dinner Meeting of Committee on Administrative Law
Dinner Meeting of Committee on Criminal Courts, Law and Procedure

February 25 Meeting of Section on Federal Administrative Controls
Round Table Conference, 8:15 P.M. Guest, Hon. James B. M. McNally, Justice, Supreme Court of State of New York
"For Bench and Bar" radio program, WNYC-FM (93.9 megacycles), 8:30 P.M., "The Excess Profits Tax with Particular Reference to New Corporations"

February 26 Dinner Meeting of Committee on Broadcasting
Meeting of Section on Litigation
Dinner Meeting of Committee on Medical Jurisprudence
Meeting of Committee on State Legislation
"On Trial"—Television Program, WJZ-TV (Channel 7), 9:30 P.M.

February 27 Meeting of Section on Corporations

February 28 Dinner Meeting of Committee on Criminal Courts, Law and Procedure
Meeting of Committee on Domestic Relations Court
Meeting of Section on Trade Regulation
Dinner Meeting of Committee on Trade Regulation and Trade-Marks

March 3 Dinner Meeting of Committee on Federal Legislation
Dinner Meeting of Committee on Atomic Energy
"For Bench and Bar" radio program, WNYC-FM (93.9 megacycles), 8:30 P.M., "Significant Changes in Separation Agreements"

March 4 Meeting of Committee on State Legislation
"On Trial"—Television Program, WJZ-TV (Channel 7), 9:30 P.M.

March 5 Dinner Meeting of Executive Committee
Meeting of Section on Wills, Trusts and Estates

March 6 Dinner Meeting of Committee on Criminal Courts, Law and Procedure
Meeting of Section on Taxation

March 10 Dinner Meeting of Committee on Professional Ethics
"For Bench and Bar" radio program, WNYC-FM (93.9 megacycles), 8:30 P.M., "Income Tax Consideration in the Preparation of Wills"

March 11 *Stated Meeting of the Association, 8:00 P.M. Buffet Supper, 6:15 P.M.*
Meeting of Committee on International Law
Meeting of Committee on State Legislation
"On Trial"—Television Program, WJZ-TV (Channel 7), 9:30 P.M.

March 12 Dinner Meeting of Committee on Insurance Law
Meeting of Section on Jurisprudence and Comparative Law
Dinner Meeting of Committee on the Surrogates' Courts

March 13 *"The Court and Counsel."* Speaker: Theodore Kiendl, Esq., 8:00 P.M. *Buffet Supper, 6:15 P.M.*
Dinner Meeting of Committee on Criminal Courts, Law and Procedure

March 17 Meeting of Section on Drafting of Legal Instruments
Dinner Meeting of Law Reform Committee
Meeting of Library Committee
"For Bench and Bar" radio program, WNYC-FM (93.9 megacycles), 8:30 P.M., "Some Problems in Drafting a Labor Contract" Title of program subject to possible change

March 18 Opening of Photographic Show
"On Trial"—Television Program, WJZ-TV (Channel 7), 9:30 P.M.

March 19 Meeting of Committee on Admissions
Dinner Meeting of Committee on Foreign Law
Meeting of Section on Labor Law
Dinner Meeting of Committee on Courts of Superior Jurisdiction

March 20 Dinner Meeting of Committee on Criminal Courts, Law and Procedure

March 24 Dinner Meeting of Committee on Municipal Affairs
"For Bench and Bar" radio program, WNYC-FM (93.9 megacycles), 8:30 P.M.

March 25 Dinner Meeting of Committee on Broadcasting
Meeting of Committee on State Legislation
Meeting of Section on Litigation
"On Trial"—Television Program, WJZ-TV (Channel 7), 9:30 P.M.

March 26 Meeting of Section on Corporations
Round Table Conference, 8:15 P.M. Guest to be announced later

March 27 Meeting of Committee on the Domestic Relations Court
Meeting of Section on Trade Regulation
Dinner Meeting of Committee on Trade Regulation and Trade Marks

March 31 Meeting of Section on Federal Administrative Controls
"For Bench and Bar" radio program, WNYC-FM (93.9 megacycles), 8:30 P.M.

Current Trends in New York Civil Practice and Procedure

By John F. X. Finn

New York's procedural code has been characterized as "a Brobdingnagian conglomeration of heterogeneous rules of law and practice."[1]

Yet the task assigned by Mr. Carson and his confrères tonight is that I discuss with wit, wisdom, clarity and superb brevity, no less a subject than "Current Trends in New York Civil Practice and Procedure." Mr. Seymour underscored the brevity a few moments ago by subtly suggesting the device of an extension of remarks for "The Record", and I quote. Then Mr. DeWitt discreetly added, *sotto voce*, that closely studded footnote annotation would not be amiss,—I presume for ultimate publication and the benefit or detriment of those lethargic and comfortable yet dues-paying thinkers of procedural thoughts who are presently ensconced before their respective television sets, as I should like to be right now, safe from the snow and the sleet.

The temptation is great to speak of everything but trends,—to speak of procedural oddities,[2] of desirable procedural reforms,[3] of the comparative merits of the 86 Federal Rules of Civil Procedure and the 1100 sections of the New York Civil Practice Act that cover the same subject matter,[4] of the New York procedural legislation of 1951,[5] of the unheralded announcement of the Appellate Division, First Department as to examinations before trial in personal injury cases after January 1, 1952,[6] of the epoch-making meeting that is to be held in this very room on January 14, 1952, attended by Presiding Justice Peck, the Superintendent

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Editor's Note: Mr. Finn, a member of the Association's Committee on the Judiciary, delivered the lecture published here under the auspices of the Committee on Post-Admission Legal Education, Ralph M. Carson, Chairman. Mr. Finn teaches New York Practice and Procedure at the Fordham University School of Law, and is the author of various law review articles and books dealing with practice and procedure.

of Insurance, the Presidents of the leading Bar Associations and a great many of the Justices of the First Judicial District, to discuss the general subject of New York Procedural Progress from the standpoint of "doing something" about tort jury calendar congestion.[7]

But I shall speak of trends. And I shall take as my text Chief Judge Crane's sentence in *Gucker v. Town of Huntington*[8] that "The pathway to the courthouse is not as important as what happens when we get there."

THE ROOTS OF PROCEDURAL TRENDS

Trends have roots. And, paradoxically, roots frequently germinate in the ivory towers of scholarship. The roots of current New York procedural growth have been laid bare in such places as in Judge Medina's comprehensive articles of 1945 and 1947,[9] in the Annual Reports of the Judicial Council,[10] in the 1950 "Dissent and Protest" of Judge Charles E. Clark and Mr. Charles Alan Wright,[11] and in the 1951 Commentary of Messrs. Ilsen and Snyder.[12]

The "fireworks" of the Council-Clark-Ilsen debate are found first in the 1947 decision of the Judicial Council to abandon a proposal of the New York County Lawyers Association that the Court of Appeals be empowered to prescribe civil procedure by rules, subject to modification by the legislature. The Council's Report said, among other things,

> "The present system of civil procedure presently employed in New York State works very well.*** That New York possesses one of the most efficient systems of civil practice in the country is generally conceded."[13]

Dissenting, Judge Clark and Mr. Charles Alan Wright wrote in 1950:

> "It seems to us that the quoted words contain about as many errors as can well be compressed into so brief a

space.*** The Council's continuous and praiseworthy attempts to secure enactment piecemeal in this State of the recognized best modern practice constitute a convincing demonstration that New York as yet does not have 'one of the most efficient systems' in the country.*** If court control must remain thus limited and subordinated (by legislative pressures) then we fear that New York is destined to stay long in its present state of procedural darkness."[34]

The *Ilsen-Snyder* rejoinder of 1951 is to the effect that

"We find a record of achievement and endeavor (in New York) which touches upon many branches of procedure. Indeed, it is to the New York Judicial Council that credit must chiefly go for introducing the many new methods adopted in this state during the past 15 years and for clarifying erroneous constructions which have sometimes grown up about old and established procedures."[35]

So much for the trend of "fireworks" or heat lightning or the sparking of flint upon flint. In this trend, at least, New York and its critics are not subject to Chief Justice Vanderbilt's observation that "One of the strangest phenomena in the law is the general indifference of the legal profession to the technicalities, the anachronisms and the delays in our procedural law."[36]

JURISDICTION OF COURTS AND CALENDAR CONGESTION

On January 1, 1952, the jurisdiction of the Municipal Court of the City of New York was increased to $3000,[37] and that of the City Court of the City of New York was increased to $6000.[38]

This accelerates a trend initiated in 1949 by Presiding Justice Peck when he induced the enactment of C.P.A. sec. 110b, providing for Removal on Consent from the Supreme Court to courts of limited jurisdiction and the new preference rules. (Rule V. subd 5, N. Y. County Trial Term) The Municipal

Courts particularly have not been suffering from overloaded calendars. The Supreme Court is bogged down. The rationale of the trend manifest is to siphon as many litigations as possible out of or away from the Supreme Court. Cases which have not been preferred will not be pre-tried. Combine with this a) the "opening up" of personal injury examinations before trial, b) the "Clerk's call," c) the new 2 P.M. calendar call in the Supreme Court for the purpose of inducing waivers of jury trial, and d) the constant reprocessing of cases and "toughening" of judges in the pre-trial parts, and you have some idea of the effect that "pecking away" at the Supreme Court calendars inevitably will have in 1952. Certainly the insurance companies will have to add substantially to their trial staffs at once, as apparently a very effective groundswell is now in motion to wash away the calendar judges' constant complaint that the nub of the law's delay is the holding of too many cases "subject" to the engagements of too few trial lawyers.

Another proposal for speeding up the calendars that is "in the wind" is one to permit the "cross-assignment" of judges from court to court. Thus, the 1951 Legislature passed a proposed constitutional amendment toward this end.[19] The effect of this would be to permit the justices of the Appellate Divisions to make temporary assignments into the Supreme Court in New York City of judges of the County Courts in New York City and of the Court of General Sessions, which is of course in effect the County Court of New York County. Thus we would have criminal court judges once again trying civil cases within the City of New York. Similarly, City Court justices would be assignable into the Supreme Court, and Municipal Court justices, along with Special Sessions justices, would be assignable into the City Court. Another concurrent resolution passed in 1951 and similarly to be submitted to the legislature of 1953 (apparently as an alternative) would permit the assignment of Special Sessions justices into the Court of General Sessions and the County Courts within the City of New York.[20]

Queens County has already been given four County Judges in place of two.[21] That is another way of attacking "the law's delay."

Magistrates have been given jurisdiction (in a "Girls Term") of delinquent girls 16 to 21 years of age, in proceedings to be deemed *civil* in character so far as practicable.[22]

Justices of the Peace now have jurisdiction up to $500 where they previously were limited to $200 and up to $100 where they were previously limited to $50.[23]

County Courts outside New York City have been given jurisdiction of actions to compel the determination of a claim to real property under Art. 15 of the Real Property Law.[24] Article 15 itself has been augmented by extending its use to cases where there has been a void or voidable mortgage foreclosure, even though reforeclosure may be barred by the Statute of Limitations.[25]

CAPACITY TO SUE—FOREIGN EXECUTORS AND OTHER LEGAL REPRESENTATIVES

Heretofore, in order to protect New York creditors of foreign decedents, foreign legal representatives have lacked legal capacity to sue in New York courts unless they had obtained ancillary letters here. This rule has been changed. Now, Decedent's Estate Law, sec. 160 permits the foreign legal representative to sue here in like manner as a nonresident, upon complying with certain precautionary restrictions set forth in the statute.[26]

When considering suits *against* foreign legal representatives, it should be remembered that section 160 does not apply. They may of course be sued in rem *(Holmes v. Camp,* 219 N. Y. 359,372) or quasi in rem, upon an attachment of assets within the state (C.P.A. sec. 520; cf. *Kirkbride v. Van Note,* 275 N. Y. 244; *Helme v. Buckelew,* 229 N. Y. 363,367) and they may in certain cases be subjected to in personam jurisdiction, as where a nonresident motorist uses the highways of New York, causes an accident, and later dies. His legal representative may be sued here,

in personam.[27] Judge Froessel's opinion in *Leighton v. Roper*, 300 N. Y. 434, is an excellent textbook on this subject. Its highlight is a sentence (p. 441) to the effect that "an action against an executor or administrator is not one purely in rem, and may therefore be founded on consent jurisdiction."

LIMITATIONS OF TIME

The trend is in the direction of repose.

True, as heretofore pointed out, we still have a cause of action for breach of a covenant of seizin or freedom from encumbrances accruing *upon eviction*,[28] but we have come a long way in other directions.

In 1925, 1938 and 1941 we forthrightly shortened many periods of limitation from 30 years to 20 years,[29] or from 20 to 6 years.[30] In one respect we had to back-track slightly because of the constitutional mandate against a gift of state moneys.[31]

In other respects we have moved forward.

In 1949, Section 41 (a) was added to the Civil Practice Act, providing that where tenants in common occupy land, the occupancy of one is deemed to have been the possession of the other, even though the occupant has acquired another title or has claimed to hold adversely to the other,—

> ". . . . but this presumption shall not be made after the expiration of fifteen years of continuous occupancy by such tenant, . . . or after an ouster by one tenant of the other."

This statute, recommended by the Law Revision Commission, thus limits to fifteen years a presumption that might otherwise run on and on unmercifully, to the confusion of real estate titles.

In 1951 (L.1951. Ch. 263, eff. Sept. 1, 1951) amendments were made, again on recommendation of the Law Revision Commission, to Sections 43 and 60 of the Civil Practice Act. Section 43 deals with actions to recover real property or the possession thereof, and Section 60 deals with actions other than real property

actions. These amendments endeavor to clarify situations such as the one presented in *Howell v. Leavitt,* 95 N. Y. 617 (1884). It will be recalled that in the *Howell* case the Court, per Finch, J., stated (p. 623):

> "The exception of the Code relates to the extension of the time limited, and puts restraint only upon that extension. It means that the disability shall not add more than ten years to the time limited after the disability has ended. Practically, in a case of infancy, it makes the extreme possible limitation a period of thirty-one years. If the cause of action accrues to an infant on the day of its birth for twenty-one years the running of the statute is suspended; then it begins to run; but the time limited—that is, the twenty years considered as a period—having in fact elapsed, it is an extension of that period which is in progress, and the exception limits that added time to not more than ten years after full age; that is until the expiration of thirty-one years. But for the exception the infant would have had forty-one years. . . ."

The 1951 amendment to Section 43 generally *shortens* the extension of time heretofore provided after a disability ceases. That time is now extended five years after the disability ceases, *but only if the time expires less than five years after either the disability ceases or the person under disability dies.* Hence, if an infant is one year of age when an action for which the time limited is fifteen years accrues, the last age at which the action can be brought is twenty-six. If the infant is twelve years of age when the action accrues, his last age for commencing action would be twenty-seven, there being no extension of time, because the time limited would expire more than five years after the disability ceases. Prior to the 1951 amendments, the last ages for bringing the action in the example cited would be, respectively, thirty-one and thirty-six, according to Judge Finch's statement just quoted from the *Howell* case. In the cases of insanity and

imprisonment, moreover, the statute now includes a provision limiting the maximum time, as extended, to thirty years after the cause of action accrues.

Section 60, in cases of insanity or imprisonment, limits the maximum time as extended to fifteen years after the cause of action accrues instead of providing, as heretofore, for an extension of five years beyond the time otherwise limited. This is a provision of repose. On the other hand, the amendments to Section 60 somewhat lengthen the extension of time after the disability ceases, as a by-product of endeavoring to arrive at a reasonable and uniform formula. Thus, if the period of limitation is five years or more, such time is now extended five years after the disability ceases, but only if that time expires before the disability ceases or less than five years after the disability ceases. Hence an action for which the time limited is six years, accruing at the ages of 1, 16 and 20, may *in each of the three cases* be brought up to the age of 26, whereas formerly the last ages for bringing the actions would have been respectively 22, 22 and 26.

As to actions for which the time limited is less than five years, the time limited is extended by the period of disability. E.g., an action for which the time limited is three years, accruing at any time during infancy, may be brought until the person reaches the age of twenty-four.[80a]

Turning back for a moment to Sec. 11 of the Civil Practice Act, please note that that section continues to provide that the Statute of Limitations is computed from the time of the accruing of a right to the time when the claim to relief "is actually interposed by a plaintiff or defendant in a particular action or special proceeding". Reading this together with C. P. A. Sec. 61 indicates that the Statute of Limitations continues to run against a defendant's counterclaim until the counterclaim is actually asserted in an Answer.[81]

It is still useful to read Secs. 13, 19 and 55 of the Civil Practice Act together. These deal with actions against non-residents, actions in which a cause of action arose outside of the state, and

actions in which the defendant absents himself from the state or resides within it under a false name. Looking back upon the amendments of 1943, I think that they have been decidedly for the better.[54]

C. P. A. Sec. 17 continues to be a very valuable section where the Statute of Limitations is threatening to run out. Two recent cases illustrate this very neatly. In *Sauerzopf v. North America Cement Corp.*, 301 N. Y. 158, a federal statute colloquially known as the "Portal-to-portal Act" (29 U. S. C. 251) provided that an "action shall be considered to commence *on the date when the complaint is filed*". Judge Conway wrote that "We do not believe that Congress thereby intended to establish a rule of procedure for state courts". Accordingly the action was deemed started with the service of a summons. Again, in *Irons v. Michigan-Atlantic Corporation* ..... A.D. ....., N. Y. S. (2) ..... decided on Nov. 8, 1951, (L. Rep. News, Nov. 26, 1951) the court held, per Piper, J.

> "When an action is brought in the state court, the laws of the state are controlling in interpreting the provisions of a federal statute of limitations as to what constitutes the commencing of an action." (Citing *Goldenberg v. Murphy*, 108 U. S. 162, and *Herb v. Pitcairn*, 325 U. S. 77.[55]

Sec. 27 of the Civil Practice Act has been amended so as to change the rule of *Nathan v. Equitable Trust Co.*, 250 N. Y. 250, which held that a person disabled to sue by reason of enemy alienage was not entitled to additional time to sue unless the disability existed when his cause of action accrued. The statute now provides that the Statute of Limitations does not run against an alien subject or citizen of a country at war with the United States "where the cause of action arose during or prior to the period of such disability". A conforming amendment was made to Sec. 28 and a new Section 28-a was added by Laws of 1950, Chapter 759, effective April 17, 1950. The added section helps non-enemies in enemy country or enemy-occupied countries and it has been held

constitutional as an express revival statute reviving a personal cause of action where exceptional circumstances would work an injustice. (*Gallewski v. H. Hentz & Co.* 301 N. Y. 164.)

C.P.A. Sec. 30 continues to provide that the statute of limitations may be raised by answer or motion, apparently whether or not the defect appears upon the face of the complaint. In *Trans-American Development Corp. v. Leon,* ..... A.D. ..... N.Y.S. (2) ..... decided December 11, 1951, by the Appellate Division, First Department, the plaintiff sued for $368,543 for services rendered between 1936 and 1936. The defendant moved under Rule 107 for partial judgment dismissing so much of the plaintiff's cause of action as appeared on the face of the complaint to be barred by the Statute of Limitations. Special Term denied the motion with leave to plead the Statute of Limitations as a partial defense, but the Appellate Division reversed and granted the motion, Judge Dore writing as follows:

> "In the absence of any evidentiary facts to avoid the statute, in the face of the showing made in support of part of the claim being barred, the manifest injustice of imposing upon defendant the expense of preparing for trial relating to events that go back 12 years is accentuated by the fact that many of the transactions relate to corporations in Roumania, which is now behind the Iron Curtain." [44]

C.P.A. Sec. 44 continues to provide that a final judgment or decree for a sum of money is presumed to be paid and satisfied after 20 years, but that a demand or acknowledgment of an indebtedness of some part of the amount within the 20 years will rebut the presumption. The acknowledgment must be in writing and signed by the person to be charged. A pretty question recently arose as to whether the exception included payments made under a garnishee execution as well as voluntary payments. (*Moran v. Fleming,* 287 N.Y. 571)

C.P.A. Sec. 48 continues to be an intriguing section for lawyers involved in stockholders actions. Subdivision 5 provides that in a fraud action the cause of action is not deemed to have accrued until discovery by the plaintiff. Subdivision 8, on the other hand, dealing with actions against directors, officers or stockholders of corporations, provides that the 6 year statute applies even if the action is for an accounting, and apparently entirely apart from the question of discovery. Further, if the action is for waste or an injury to property or for an accounting in connection therewith, the three year limitation of Sec. 49, subdivision 7, applies on the theory that such actions are actions "to recover damages for an injury to property."

It would be most difficult to pinpoint the law governing statutes of limitations in stockholders actions. Investigators in that field should start with such cases as *Brundige v. Bradley*, 294 N.Y. 345, *Mannaberg v. Klausner*, 294 N.Y. 859, *Hastings v. Byllesby*, 293 N.Y. 404, *Gobel v. Hammerslough*, 288 N.Y. 653, *Hearn v. Jano*, 283 N.Y. 183, *Frank v. Carlisle*, 286 N.Y. 586, *Brick v. Cohn-Hall-Marx*, 276 N.Y. 259, *Nasaba v. Harfred*, 287 N.Y. 290 and *Schmidt v. Merchants Despatch Transportation Co.* 270 N.Y. 287.

In such cases there is an interesting theory of action which assumes, arguendo, that the plaintiff's primary cause of action is barred by the Statute of Limitations and then claims that a secondary cause of action exists in that express and deliberate representations of the defendants concealed the cause of action from the corporation and it stockholders, thus causing the Statute of Limitations to run. Whether this constitutes a cause of action based on actual fraud which did not accrue until the discovery of the fraud poses an interesting problem. I have in mind such discussions as those found in *Druckerman v. Harbord*, 31 N.Y.S. (2) 867, 871, *Lifshutz v. Adams*, 285 N.Y. 180, 185, *American Cities Power & Light Corp. v. Williams*, 69 N.Y.S. (2) 197 and *Alexander v. Anderson* 267 A.D. 984, 48 N.Y.S. (2) 801, affirming 48 N.Y.S. (2) 102. In the *Alexander* case the court said

"As to the second cause of action, it is dependent upon the first; the gravamen thereof is that the defendants deliberately prevented the corporation from obtaining redress for the bonus mis-computation; that their objective was to accomplish the expiration of the applicable statute of limitations against some of the causes of action of the corporation, whereas, if they had been timely asserted the corporation would have recovered thereon.

Where the expiration of the statute of limitations results from a fraud or other wrong practised upon one having an enforcible legal right, a cause of action will lie for the loss sustained in consequence."

Section 50-e of the General Municipal Law has been amended to provide that service of notice of a tort claim made on a public corporation within 90 days, which is technically defective, (e.g. which was not served personally or by registered mail on a person legally designated to receive service of a summons) shall nevertheless be valid if the notice was actually received by that person and the party against whom the claim is made causes an examination to be taken of the claimant or other interested person. (L. 1951, Ch. 393, subd. 3).

Turning now to another subject, the Statute of Limitations has been held to run in favor of one spouse against another even while the spouses are living together. (*Dunning v. Dunning*, 300 N.Y. 341).

[Parenthetically, a husband's agreement to pay his wife's state income taxes is unenforceable. (Tax Law, sec. 385; *Mahana v. Mahana*, 272 A.D. 1013, 74 N.Y.S. (2) 908; *Metcalf v. Metcalf*, 274 A.D. 744, 87 N.Y.S.(2) 722, affg. 82 N.Y.S. (2) 209).]

A recent statute (L. 1950, ch. 301, sec. 7) waives immunity from certain suits against the Port of New York Authority with a one year period of limitation. This was enacted to become law upon the enactment by the State of New Jersey of legislation having an identical effect. The New Jersey Legislature of 1951

passed such legislation, and the Governor of New Jersey duly signed it. (L. 1951, ch. 204, effective June 13, 1951).

Ravens v. Linzer, 302 N.Y. 188, has been affected by Laws of 1951, Chapters 430 and 431, which raise a question as to whether an independent action may now be maintained (rather than a motion under Art. 84) to set aside an award fixing rent, if brought within the 90 day time limit of the statute. (C.P.A. sec. 1463).

The Workmen's Compensation Law, Sec. 29, subd. 2, was amended by Laws of 1951, Chapter 527, to provide that failure of an employee to commence an action within the time limited shall not operate as an assignment of his cause of action to the insurance carrier unless the insurer gives notice thereof at least 30 days prior to the expiration of such time, and if such notice is not given the time limited shall be extended to 30 days after notice is given.

In Workmen's Compensation and other "administrative tribunal" cases a vital question of res adjudicata is passing through the courts. One judge has held that despite a paucity of authority, the determination of an administrative tribunal is never res adjudicata upon a court.[85] Other cases are to the contrary.[86]

I throw this thought in here to let you know that discussion of the dry-as-dust Statutes of Limitation has now been concluded and that we are in transition to the subjects of Process, Pleading, Trial and Judgment, through which each ordinary action runs a normal course.

Time does not permit touching upon the distinction between C.P.A. Secs. 96 and 96a, the apportioning of damages permitted by C.P.A. Sec. 97a, the availability of an application under Sec. 98 for an extension of time even though the time has run out, the "hip-pocket" filing system of Sec. 100 and the majestic Article 9 (Secs. 105–112) which so forthrightly deals with Mistakes, Defects and Irregularities. Secs. 110a and 111, should be required reading for every refresher course in New York Practice. And one of the crowning glories of the Civil Practice Act is the series of sections (112a, b, c, d, e, f, g and h) which so

thoroughly jettisoned the technicalities of election of remedies, the distinction between mistake of fact and mistake of law, and the necessity for physical tender in actions for rescission or restitution.

C.P.A. Sec. 113 abolished the horrible doctrine of *Low v. Bankers Trust Co.*, 265 N.Y. 264, which had held that a motion is not "made" until it is returnable in court. The contrary is now the law, and a motion is "made" when the notice of motion or order to show cause is duly served.

Secs. 132 and 66 of the Civil Practice Act providing that an ex parte order may be reviewed by the Appellate Division or one of its Justices (upon motion papers without a formal appeal) became living things for me after I read a study of them prepared by my good friend and former student Mr. Leonard Feldman, whose study will be published in the near future. He cites one case which appears to indicate that after adversaries have appeared on notice before a Justice at Special Term and procured a ruling from him, and thereafter one of the counsel goes back into chambers, and procures *a repetition* of the ruling (but now ex parte) such ex parte, though repetitious, ruling may be reviewed upon application to the Appellate Division under Sec. 66 and Sec. 132. (*Matter of New Rochelle Trust Co.*, 273 A.D. 1030.)

Rulings at Special Term, Part 2 upon objections made in examination before trial are not appealable (*Oppenheimer v. Duophoto Corp.*, 271 A.D. 1005, 69 N.Y.S. (2) 309; *Dworkow v. Bachrack*, 274 A.D. 1057, 85 N.Y.S. (2) 214 and cases cited therein). Apparently they are not even reviewable under Section 132 or under C.P.A. Sec. 66, for public policy reasons against "flooding" the Appellate Division. If such rulings sustain your adversary's objection you may move at Special Term, Part 1 either (1) to resettle the order of examination (*Le Blanc v. Duncan*, 260 A.D. 953, 23 N.Y.S. (2) 648) or (2) to reopen the examination for the purpose of permitting questions to be answered. (*Kogel v. Trump*, 271 A.D. 890, 66 N.Y.S. (2) 899.)

If the Special 2 rulings overrule your objection, then either move to resettle the order to make it clear that it was not intended that such a question be answered, or let the witness answer and move at Special Term Part I to suppress the deposition (*Gottfried v. Gottfried*, 197 Misc. 562, 95 N.Y.S. (2) 561, 563), lest you be deemed to have waived your objection. (*Sturm v. Atlantic Mutual Ins. Co.*, 63 N.Y. 77, 87.) Mr. Justice Walter soundly infers in the *Gottfried* case that an order denying a motion to suppress enables the point "to get to the Appellate Division" without "some very cumbersome and circuitous procedure of getting it up as an incident of an appeal from a final judgment". On the other hand, there is law to the effect that an order denying a motion to suppress is not appealable (*Wallach v. Siegelson*, 105 N.Y.S. (2) 35, 36.)

I hope that the Judicial Council will do something to help the lawyer whose objection to the disclosure of trade secrets in examination before trial is overruled. He cannot appeal under the *Oppenheimer* and *Dworkow* cases, supra. For him to disclose, move to suppress, and then win is small comfort once the secret is out of the bag. And if the motion to suppress is denied there is doubt as to the appealability of the order of denial. This doubt should be removed. (Cf. *Kaplan v. Roux Labs. Inc.*, 273 A.D. 865, 76 N.Y.S. (2) 601; *Gehm v. Countess Moritza*, 95 N.Y.S. (2) 754; *Hyman v. Revlon*, 277 A.D. 1118, 100 N.Y.S. (2) 937; *Drake v. Herrman*, 261 N.Y. 414.)

Last year the Judicial Council sponsored an excellent amendment to Section 132.

Presiding Justice Peck was in Europe and a lawyer seeking to invoke Section 132 found that under the section as it then read only the Court or the Presiding Justice could act. A letter was written to the Judicial Council that "there ought to be a law". L. 1951 Chapter 161 eventuated, after a careful study, allowing action by *any* Appellate Division Justice. (Seventeenth Annual Report of Jud. Council (1951) p. 74.)

Another important "trend" sponsored by the Judicial Council

is Sec. 163a, which permits deposit in "any" post office depository, such as a mail-box, to comply with a mailing statute. This was added by L. 1951, Chapter 554. In *Mandel v. Brodsky*, 199 Misc. 8, 102 N.Y.S. (2) 555, a judgment obtained 14 years earlier was set aside because the order permitting substituted service provided for deposit of a copy of the summons in a mail box rather than in a general or branch post office. It is thoroughly understandable why Mr. Justice Carlin stated in his opinion that "the Court reluctantly so holds."

Sec. 192 of the Civil Practice Act provides that no action or special proceeding shall be defeated by the non-joinder or misjoinder of parties except as provided in Sec. 193. This language induced an interesting observation by Judge Finch in *Cohen v. Dana* 287 N.Y. 405. In that case a stockholders' derivative action was instituted against directors for alleged misconduct to the detriment of a dissolved corporation. It was impossible to serve the corporation with a summons in New York. At the end of his opinion Judge Finch stated: "It may become necessary to consider also to what extent the statutory direction is applicable that no action shall be defeated by the non-joinder of parties. C.P.A. Sec. 192". Consider with this suggestion the doctrine of *Keene v. Chambers,* 271 N.Y. 326, to the effect that when an indispensable party is outside the jurisdiction his or its presence in the action may be dispensed with.

Sec. 193 defines indispensable and conditionally necessary parties. In a nutshell, indispensable parties are defined as persons "whose absence will prevent an effective determination of the controversy or whose interests are not severable and would be inequitably affected by a judgment rendered between the parties before the court." An example of an indispensable party is a joint obligee on a contract. A conditionally necessary party is a party who is not indispensable but one who "ought to be a party if complete relief is to be accorded between those already parties." A partial assignee is a good example of a conditionally necessary party. All other parties are proper parties, as for example joint

tortfeasors who are liable jointly and severally. In the case of proper parties, of course, the plaintiff has the option to sue one, any, or all.

A whole treatise could be written on Sec. 193a, dealing with "Third-party practice." The principal function of this statute is to abolish the rule of *Nichols v. Clark, MacMullen and Riley, Inc.*, 261 N.Y. 118. It is now squarely provided by statute that a "claim over" need not arise out of the same cause of action or the same ground as the claim asserted against the third-party plaintiff by the plaintiff in the action.

A great body of law is growing up under this section in tort cases. The fulcrum of the discussion is the decision in *Fox v. Western New York Coach Company*, 257 N.Y. 305, to the effect that a joint tortfeasor cannot bring another joint tortfeasor into an action unless there is a liability over "by contract or status." If A sues B in tort alleging that B was actively negligent, B may not claim over against C, a joint tortfeasor, because if both parties are in pari delicto there can be no contribution between them and no "claim over" of any kind under the *Fox* doctrine.[27] If the theory of the plaintiff's complaint is such that when A sues B the plaintiff may recover from B on the theory of *either* B's active negligence or B's passive negligence, then B may bring in C as a third-party under Sec. 193a because it may be that on the trial the jury will find that B's liability to A arose solely out of passive negligence.[28]

A few additional commentaries on Sec. 193a and Rule 54:

Impleader is accomplished according to the statute by service by *a defendant* of a summons and verified complaint. He needs no order of a court or judge permitting this, the practice being in this respect comparable to the assertion of a counterclaim under C.P.A. Sec. 271. Two judgments in the one action are permitted. The third-party defendant may assert against the plaintiff defenses of the third-party plaintiff, thus to this extent taking the defense "strategy" away from the defendant. The third-party defendant may also counterclaim against the plain-

tiff if the complaint in the action is amended to assert a claim against such third-party defendant. And once the third-party defendant has appeared, *the plaintiff* in the action may move to dismiss the third-party complaint, Further, the third-party defendant may bring in a fourth or fifth party. Similarly, a plaintiff, if counterclaimed against, may himself bring in a third-party defendant. Rule 54 makes it clear that any third-party "action" is an "action-within-an-action," which must be started by the service of at least four papers, viz, the third-party summons, the verified third-party complaint, the complaint of the plaintiff and defendant's answer thereto. There is one answer to two complaints, but apparently there is no penalty for the failure of the third-party defendant to answer plaintiff's complaint, which, however, he is expected and required to answer.

A distinction between Sec. 193a and Sec. 264 is apparent from the decision in *Deneau v. Beatty,* 195 Misc. 649, 91 N.Y.S. (2) 190. There a defendant successfully asserted against his co-defendant under Sec. 264 an affirmative claim for his own damages. This cannot be done under Sec. 193a. (*Victory v. Miller,* 198 Misc. 196, 101 N.Y.S. (2) 350.)

An unusual case is *Clark v. Halstead,* 276 A.D. 17, 93 N.Y.S. (2) 49, in which, in an *"Ader v. Blau"* situation, the defendant tortfeasor was permitted to bring in a malpractising physician under Sec. 193a, on the theory of subrogation. The court indicates that if there is an $11,000 verdict for plaintiff, the jury may determine *the percentage* of the $11,000 which is represented by the aggravation of the injury by the physician's malpractice. (See Note, 49 Mich. Law Rev. 292, Dec. 1950). This principle is to be viewed as a trend away from the established doctrine that a jury ordinarily may not apportion damage among joint tortfeasors liable on the same cause of action.** Another such "trend away" is found in libel cases (C.P.A. sec. 97a) and in cases involving possessory estates (C.P.A. sec. 193c).

Incidentally, the doctrine of *Ader v. Blau,* 241 N.Y. 7, has been removed from our law, root and branch. It had held that

despite the "unifying center" of the death of a single human being, a cause of action against a fence-owner for negligence in maintaining the fence could not be joined with a cause of action against a physician whose malpractice contributed to the same death, inasmuch as the two causes of action, forsooth, were not "connected with the same subject of action." The case might have been distinguished by the plaintiff's specific allegations that each of the two acts was the "sole" cause of death. Yet it was severely criticized for conceiving a "cause for action" in terms of legal right rather than factual events.[40] In any event, the doctrine of *Ader v. Blau* has passed from obscurity to oblivion by the amendment of C.P.A. sec. 258 and by such decisions as *Great Northern Tel. Co. v Yokohama Bank*, 297 N.Y. 135, and *Ikle v. Ikle*, 257 A.D. 635, 14 N.Y.S. (2) 928.[41] Both causes of action may today be joined, apparently even if pleaded in inconsistent fashion by repeated use of the word "solely." (Though see such cases as *Olsen v. Bankers Trust Co.*, 205 A.D. 669, 199 N.Y.S. 700, *Herman v. First*, 99 N.Y.S. (2) 119 and *Condon v. Assoc. Hosp. Service*, 287 N.Y. 411, 415 as to inconsistent allegations which are "mutually destructive.")

In passing, I suggest to the Judicial Council that with Sec. 258 permitting joinder of inconsistent causes of action in a complaint, the time has come for a re-examination of the doctrine of "departure" of a reply from the theory of the complaint (C.P.A. sec. 272). If a plaintiff may be inconsistent with himself in his own complaint, why must his reply set forth new matter "not inconsistent with the complaint?" The time appears to be at hand for excision of the quoted language from Sec. 272. (Cf. *Rosen v. Rosen*, 267 A.D. 770, 45 N.Y.S. (2) 216.)

A word, in passing also, about Contribution among Joint Tortfeasors. Sec. 211a permits contribution only where plaintiff has joined joint tortfeasors as defendants and recovered judgment against them jointly and one of them has paid more than his "pro rata share." In nine jurisdictions statutes have been enacted providing for a *right* of contribution among joint tort-

feasors which is not dependent upon the whim of the plaintiff as to whom he will sue.[42] Three states have established the right by decisional law.[43] The right exists in admiralty. And the District of Columbia has established it by construction of Fed. Rule of Civil Procedure 14a. In addition, the Supreme Court of the United States has held that the Federal Tort Claims Act gives sovereign consent of the United States to be sued for contribution either in a separate action or by way of third-party procedure.[44] It is against this background that a contribution bill introduced in the New York legislature of 1952 should be studied (Sen. Int. 42; Assembly Int. 192) bearing in mind that there is a trend in the direction of finding a right *of complete indemnity* in favor of a passive tortfeasor upon comparing his "relative delinquency" with an active tortfeasor. In many such cases, would not a rule of contribution be fairer and more reasonable than the existing rule of complete indemnity? If so, the proposed 1952 statute should be "thought through," and supported, and not tossed to an impromptu and ignominious demise.

PROCESS

A Supreme Court summons must state the county in which plaintiff resides (Rule 45).

The granting of a provisional remedy is deemed the commencement of an action (*Schram v. Keane*, 279 N.Y. 227; *Arnold v. Mayal*, 299 N.Y. 57.)

Partners may sue or be sued in their partnership name.[45]

An unincorporated association is regarded as an entity for the purpose of permitting suits against it for libel.[46]

An unincorporated labor union may be sued in tort.[47]

But its members, who did not authorize the union's tort, may not be sued individually.[48]

Persons are not "parties" just because "named" in a summons. They are not parties until process has been served.[49]

Service of a 30 day landlord-tenant notice on Sunday is void.[50]

For a foreign corporation to be deemed to be "doing business" here, "continuity of action from a permanent locale is essential."[51]

Section 227-a of the Civil Practice Act is novel. A non-resident who sues here is deemed to designate his attorney as his agent to receive process, during the pendency of the action, in *any* New York court, "provided the cause of action or claim is one which could have been interposed by way of counterclaim had the action or proceeding been brought in the Supreme Court."[52]

Section 229b, entitled "Service of summons on non-resident natural person doing business in this state" is now pretty well understood,[53] and it has been held constitutional.[54] However, a labor union or an unincorporated association is not a "natural person" and thus not subject to it.[54]

Substituted service, service by publication, and service outside the state without an order I am going to pass by tonight because I have charted the entire subject matter in a detailed diagrammatic summary which was published in the Fordham Law Review under the title "Constructive Service of Process in New York". Its citation is 18 Fordham Law Review 244 (Nov. 1949) and I commend it to your study.

Outstanding recent cases on the subject hold that in personam jurisdiction is acquired over New York domiciliaries who are served outside the state without an order and without an attachment;[55] that in equity actions service by publication upon a New York domiciliary results in in personam jurisdiction;[56] that in *in rem* equity actions service by publication is valid even against a non-resident, and of course, without an attachment, since there is no attachment in equity cases;[57] that in matrimonial actions sequestration may occur at any time before judgment and even after the order of publication is signed;[58] that the provisional remedy of attachment is available against "colossus corporations" present in New York even where plaintiff's claim arose entirely

outside New York;[80] and that the Supreme Court has power to enjoin a resident of New York from departing to a foreign jurisdiction to institute a matrimonial action there.[80]

An extraordinary matrimonial case is *Johnson v. Muelberger*, —U.S.—, (95 Sup. Ct. 411) in which the Supreme Court reversed a unanimous New York Court of Appeals.[81]

Particularly intriguing is *Feuchtwanger v. Central Hanover Bank*, 288 N. Y. 342, since it has been said that "you can't legislate a debt into a res" and that that is why we have the complicated interpleader schemes found in C.P.A. Secs. 287a–i and 51a. Nevertheless, in the *Feuchtwanger* case the court judicially legislated a debt into a res for service-by-publication purposes and held that "an intangible res is so far capable of explicit designation as to be *specific* personal property within the meaning of C.P.A. sec. 232." (Italics added) Thus although ordinary interpleader is in personam, and service by publication is not possible in connection with it,[82] yet the adroit pleader who fashions his "cause of action" into one *in rem* by transforming a simple creditor-debtor cause of action against a bank into an "action to impress a trust" upon the bank account enables the bank to achieve valid interpleader jurisdiction based upon service by publication. Verily, "a word is the skin of a living thought," and the "open sesame" to money in the bank.

APPEARANCE

A corporation must appear in an action by an attorney (C.P.A. sec. 236).

A foreign ambassador who has not waived sovereign immunity is quite immune from suit even if he appears.[83]

The doctrine of *Muslusky v. Lehigh Valley R.R.*, 225 N.Y. 584, has been abolished by amendment of C.P.A. sec. 257.

The whole field of Special Appearance has been reworked and revamped. First, Rule 106, subd. 1 and Rule 107, subd. 1, permitting motions to dismiss for lack of jurisdiction of the

person of defendant, have been rescinded and the rules renumbered.[64] Second, out of a law-review article[65] and a study by the Judicial Council[66] has come new Sec. 237a of the Civil Practice Act, which is best explained by the following excerpt from three paragraphs of the 1951 (Seventeenth) Report of the Judicial Council, at page 58 thereof:

> "Although a special appearance has been permitted in New York for over 100 years, there is at present no statute or rule permitting or regulating such appearance.****
>
> For some problems confronting the New York attorney, no solution is to be found in the cases. The outstanding example is that involving nonresidents against whom in rem and in personam claims have been stated in one complaint, with the court having jurisdiction in rem, but not, allegedly, jurisdiction in personam. It has been repeatedly held in such a situation that a motion to vacate the service of process will not prevail. The defendant must raise his objection to the court's jurisdiction over his person by motion, but precisely what motion he is to make in such a situation has not been indicated.
>
> Once it is agreed that is it desirable to permit a defendant to come into court to object to its jurisdiction over his person (and, as herein recommended, over the subject matter) without thereby submitting his person to the court's jurisdiction for all purposes, a simple, direct, and clear-cut statement of the procedure to be followed in making such an appearance should be at hand. The books are replete with evidence that it is not."

Hence the new Sec. 237a. The objection of lack of jurisdiction of the person "must" be raised by a motion *to set aside service of process* or *to strike out* part of the complaint. Otherwise it "shall be deemed waived." No objection to the merits may be joined with it, either, except an objection that the court lacks jurisdiction of the subject matter. If the motion is denied, defendant

may litigate the merits without waiving the objection to the court's jurisdiction over his person.

PLEADING

It is significant that not only is there a statutory mandate for liberal construction of the Civil Practice Act in Sec. 2, but that there is a double mandate for liberality in pleading, since pleadings "must be liberally construed." (C.P.A. sec. 275).

Causes of action may be pleaded in the alternative, whether or not there is doubt as to "who" is liable (C.P.A. Sec. 258).

Sec. 265 of the C.P.A. has been repealed, but only because repetitious of Decedent's Estate Law, Sec. 131. Hence in a death action the burden of pleading and proving the contributory negligence of the decedent is still on the defendant,[67] who in a proper case may even have to provide a bill of particulars of the defense.[68]

In a simple negligence action, despite an occasional dictum to the contrary,[69] I think that the better view is that although the plaintiff must prove his freedom from contributory negligence, he need not plead it in the average case.[70]

If a plaintiff sues in his own right and not as assignee, the defendant may go out and "buy up" a claim against plaintiff for the express purpose of counterclaiming it.[71] This is not so if plaintiff is an assignee (C.P.A. Sec. 267).

Parallel claims are not counterclaims.[72]

A recent case, to my consternation, has allowed a reply to a reply.[73] I trust that this is not a trend back to the seven pleadings of the common law.[74]

MOTION PRACTICE

I need say little about Motion Practice, since Mr. Samuel S. Tripp, President of the Queens County Bar Association, has so ably summarized the topic in his excellent "Guide to Motion

Practice", the 1951–1952 Supplement to which I find terse, readable and invaluable.

The necessity for many cross-motions is disappearing (Rule 109 subd. 6; Rule 112; Rule 113) and much of the doctrine of *Bernard v. Chase National Bank,* 233 A.D. 384, 253 N.Y.S. 336, has been discarded from our procedure. But cross-motions have not been abolished. (C.P.A. sec. 117).

Here is a problem: Suppose an action upon an oral contract for the sale of land. The vulnerability of the complaint because of the Statute of Frauds is apparent on the face of the pleading. Rule 107 permits a motion even though the defect does not appear on the face. Suppose the motion is not made, and defendant desires to plead the Statute of Frauds. Has he waived the objection by failing to move against the objection appearing on the face? C.P.A. Secs. 278, 279, 280 do not mention the Statute of Frauds, and the "waiver rule" of *Gentilala v. Fay Taxicabs,* 214 A.D. 255, 212 N. Y. S. 101, revd. o.g. 243 N. Y. 397, is not clearly applicable. Perhaps a more comprehensive "waiver rule" should be worked out by statute, Rule of Civil Practice, or case, in order to clarify the subject.[75]

Rule 113 requires an evidentiary "affidavit". Would *a deposition* do? C.P.A. Secs. 303 and 307 and Rule 120 permit the use of a deposition upon a motion. But conflicting cases say that a deposition is an affidavit,[76] and that it is not an affidavit.[77] This should be clarified and Rule 113 should be amended to permit the use of a deposition if an affidavit is not practicable.

A counterclaim may be stricken out as sham under Rule 103 (*Gould v. Parker,* N.Y.L.J. Nov. 25, 1949, p. 1378, col. 3; Cf. *Esteves v. Swofodzien,* 195 Misc. 956, 90 N.Y.S. (2) 844, (aff. defense).

A negligence bill of particulars must always be verified (Rule 117). And a bill of particulars, while not a pleading, may yet be used upon a motion for judgment on the pleadings under Rule 112. Indeed, there are at least two cases that permit use of *an affidavit* upon a Rule 112 motion, not to adjudicate issues, but to

show *the existence* of issues of fact, such as the tolling of the Statute of Limitations.[78]

Another motion rule of interest is Rule 65. A moving party need not serve copies of papers which are in the possession of his adversary. A notice to produce upon the motion, moreover, may be served with the motion papers. Under this rule if the opposition's income is material in the litigation, he can be compelled to produce his retained copies of his Income Tax Returns.[79] And in response to the gentleman's question from the floor about the Internal Revenue Code, I need only call attention to the twinkle in Mr. Justice Shientag's eye as he sits so unobtrusively over there, for it was he who wrote in *Leonard v. Wargon*, 55 N.Y.S. (2) 626, in the Supreme Court of Bronx County in 1945, that

> "There is nothing in the Internal Revenue Code (26 U.S.C.A.) which confers upon a judgment debtor any privilege against disclosure by him of the contents of such returns."

EXAMINATIONS BEFORE TRIAL AND DEPOSITIONS

The great trend of the hour is the new Rule X of the Trial Term Rules of New York County which is numbered Rule XIX in Bronx County. I read it to you word for word:

> "Testimony taken by deposition before trial in an action for damages for personal injuries.
>
> In an action for damages for personal injuries or brought pursuant to section 130 of the Decedent Estate Law, at any time after the service of an answer, any party may cause to be taken by deposition, before trial, the testimony of any other party, his agent or employee, pursuant to sections 288 and 289 of the Civil Practice Act.
>
> At least ten days' notice of such examination shall be served in accordance with the provisions of section 290

of the Civil Practice Act. Notice of at least five days may then be served by the party to be examined for the examination of any other party, his agent or employee; such examination to be noticed for and to follow at the same time and place. It shall be sufficient if, as to matters upon which a person is to be examined, the notice shall state "all of the relevant facts and circumstances in connection with the accident, including negligence, contributory negligence liability or damages."

This rule shall take effect January 1, 1952, and shall apply to all pending actions as well as those hereafter brought."

I imagine that we shall hear more of this in this room on next Monday night, January 14, 1952.

Please notice that the new rule does not apply to property damage actions.

The trend, of course, is toward the "wide open" practice of the Federal Rules of Civil Procedure.

The "ice-breaker" in New York was *Marie Dorros, Inc. v. Dorros* 274 A.D. 11, 80 N.Y.S. (2) 25, abolishing the need for the affirmative in commercial litigations.

That was followed by Rule 129a, explicitly permitting cross-examination on examination before trial.

Now, Rule X. It may readily be seen that law offices will be busy, reporters will prosper, and that calendars may crumble. Such is the trend that may cause our generation to go down in history as that of the Golden Era of the conquering of the law's delay, even in a metropolis.

Under Sec. 288, the testimony may be taken of agents or employees of partnerships and of individuals conducting business under their own names or under trade or assumed names. Under Sec. 289, where an action is against a corporation (e.g. Brooklyn-Manhattan Transit Corp.) and the action is defended by a transferee or assignee (e.g. the City of New York) the

testimony may be taken (by order only, not by notice) of any former officer, director, agent or employee of the transferror corporation.

Under Sec. 300, a person to be examined may generally be compelled to attend only in the county where he resides or has an office, and, if a non-resident, only in a county in which he is served with a subpoena. An order served upon him personally may otherwise direct. An order served upon his attorney may only direct one other place, viz, the county where the action is pending.

The general subject of the use of books and records upon an examination before trial is usually dealt with by the motion judges by simply citing C.P.A. Sec. 296 and *Beeber v. Empire*, 260 A.D. 68, 20 N.Y.S. (2) 584. Sec. 296 is not too clear.

A subpoena duces tecum will bring a party's books to the examination. It will not permit their use in evidence if they are not used by the party to refresh his recollection.[80] By order, however, the court may direct otherwise.[81] Now suppose that a party, whose books have been subpoenaed, consults page 77 of this Ledger to refresh his recollection. Is page 77 for that reason admissible in evidence? No. Even on a trial the mere fact that a witness uses a paper to refresh his recollection does not make it admissible in evidence on that account.[82] Now, upon an examination before trial, may the examiner inspect the paper which the witness uses to refresh recollection? Apparently not,[83] even though upon a trial inspection is authorized to test credibility, e.g. to show that the paper could not honestly refresh recollection.[84]

The moral would appear to be (if the rules are not harmonized) to procure an order combining examination before trial with discovery and inspection.[85]

There is authority for the proposition that a witness who is not a party to the action should not be required to produce any of his books or papers.[86]

If a plaintiff examines a defendant before trial, and the de-

fendant appears at the trial but does not take the stand, *the defendant* may nevertheless read into evidence his own deposition, taken by plaintiff.[87]

Section 306a, permitting blood-grouping tests to establish exclusion, is of interest as the possible forerunner, in civil cases, of the use of lie-detector evidence. Lie detector evidence was once admitted[88] but later excluded.[89] Fordham University is continuing its experiments with an electro-dermal lie detector (or pathometer) and in due course the demonstrated superiority of such a device over blood-pressure devices may warrant a new test litigation seeking to give lie-detector evidence in civil cases the status of fingerprint evidence in criminal cases. I have even heard of a plan to compel alleged "drunken drivers" to undergo police-station medical tests to determine the quantity of alcohol in their blood. Of course the constitutional considerations of the recent "stomach contents" decision will have to be given careful consideration in criminal cases.[90] And in any event the report of the test may be challenged by evidence tending "to show the procedure followed, its accuracy, whether any margin of error may exist in the conduct or results of the tests and the conclusiveness or lack of conclusiveness of the findings."[91]

Letters rogatory (C.P.A. sec. 309) may be used where an ordinary commission is unavailable. Soviet Russia virtually compels their use in matters Russian, as they are processed through the diplomatic channel.[92]

Notices to admit pursuant to Sec. 322 C.P.A. may not be vacated or modified at Special Term.[93] If sec. 322 is not complied with by admission or otherwise, the facts are "deemed admitted." And these formal admissions (and only these) may be used on a motion for judgment on the pleadings pursuant to Rule 112 and C.P.A. sec. 476.[94]

EVIDENCE

The tersest textbook on New York Evidence is Article 33 of the Civil Practice Act (Secs. 329–420).

A 1951 amendment to Sec. 412 permits photographic copies of hospital records to constitute compliance with a subpoena duces tecum. This elimination of the nuisance of transcription saves the hospital infinite expense and permits quicker response to lawyers' requests.

I call attention to a well-written article by Mr. C. Bedford Johnson, Jr. which he has entitled "Admissibility of Photographic Reproductions of Writings."[86] It should serve as the basis for new legislation giving legal recognition to the commercial world's acceptance of photographic reproductions as primary evidence (E.g. a bank's "Recordak" system).[86]

In death actions evidence of dependency is now admissible to enable the Surrogate or other court having jurisdiction to determine the incidence of pecuniary loss. Thus a widow with two children may receive 40% or even 60% of a recovery where normal distribution of her husband's estate upon intestacy would give her only 33 1/3%.[87]

An "evidence" topic of interest is the extent to which a cross-examiner may use a book or opinion in cross-examining an expert witness. Contrary to some popular impressions, a cross-examiner may *not* ask a witness if he agrees with a book or an opinion unless the expert has relied upon the book or opinion or referred to it in his direct examination.[88] A recent observation in this connection is as follows:

> "** the examiner will not be permitted to ask the witness if he agrees with Sir William Osler's famous observation in one of his medical treatises that it was remarkable how soon after a lawsuit patients suffering from injuries caused by shock recovered their health."[89]

I read in this morning's press Governor Dewey's observation in his Annual Message to the Legislature that the proposed Uniform Commercial Code "merits careful study." I agree with that. But from the reactions of lawyers with whom I have spoken who have studied that proposed Code, I prophecy that in the

not too distant future someone will write of it, as did Professor Morgan about the proposed Model Code of Evidence,

> "The reception which the Model Code of Evidence of the American Law Institute has met strongly indicates that the bar at any rate is not ready for codification." [100]

TRIAL

Many lawyers lose sight of the efficacy of Sec. 443 subd. 3 of the Civil Practice Act, which permits a separate trial of one or more issues. This is hidden away in the statute, but it is worthy of more general use, particularly in cases in which there has been a general release.[101]

For non-jury trials important amendments have been made to Sec. 549 of the Civil Practice Act. The doctrine of *Corr v. Hoffman,* 256 N.Y. 254, 268, to the effect that a trial court has "no revisory or appellate jurisdiction to correct by amendment error in substance affecting the judgment" has been abolished.[102] The trial court may now correct its errors instead of directing a new trial, and it may "take additional testimony, amend findings of fact and conclusions of law and render a new decision."

A definition of "interested witnesses" is found in *Noseworthy v. City of New York,* 298 N.Y. 76.

It is elementary that ordinarily jurors will not be allowed to impeach their own verdict.[103] Yet affidavits of jurors may be considered as to statements made outside the jury room[104] or to show that the jury forgot to consider interest or that the five-sixths rule of Sec. 463a was not complied with.[105]

In non-jury trials the parties frequently waive formal findings of fact and conclusions of law. However, even if there is such a waiver and the case is settled during trial there can be no determination upon the merits of a non-jury case without something in the nature of findings of fact sufficient to apprise the parties and the appellate courts of what facts were essential to the trial court's determination.[106]

The parties can compel formal findings of fact in a non-jury case if they submit proposed findings with or before the submission of their final briefs after the trial (C.P.A. sec. 439).

JUDGMENT AND COSTS

Just ten years ago, on December 2, 1941, I lectured from this rostrum at the request of this Committee on the subject "Declaratory Judgments versus Advisory Opinions—Evolution against Revolution." My conclusions were summarized in the form of so-called "Ten Commandments" governing declaratory judgments which were published on the first page of the New York Law Journal of December 2, 1941.

A resurvey, from the years 1941 through 1949, is found under the heading "Development of Law, Declaratory Judgments" in 62 Harvard Law Review 787–885. My 1941 conclusions in the light of that resurvey continue to be my 1952 conclusions. (They will be found written up as "the organic law of sound declaratory judgment practice in New York" in Carmody's Manual of New York Civil Practice, 1946 Edition, pp. 634–639, under the heading "Principles Regulating One's Right to Resort to an Action for a Declaratory Judgment.")

A declaratory judgment may be in rem or in personam (Redfield v. Critchley, 277 N.Y. 336, 339—at least, this is what I deduce from the Court's reference to an "unwarranted conclusion").

Perhaps the best New York declaratory judgment decision is *N.Y. Foreign Trade Zone Operators v. State Liquor Authority* 285 N.Y. 272.

A judgment must state the residence address of the person in whose favor the judgment was rendered (C.P.A. Sec. 501, subd. 2) and the trade and last known address of the judgment debtor (C.P.A. sec. 501 subd. 1).

Affidavits of "no military service" are governed by Military Law, sec. 303, and "interest" is governed by C.P.A. sec. 480.

A new and simple bill of costs (aggregating $150) is provided

for Supreme Court cases within New York City (C.P.A. Sec. 1504a, added by L. 1951, ch. 502.) Thirteen items have become three, based upon average amounts derived from a County clerks' survey. In the City Court costs are increased to Supreme Court amounts (L. 1951, ch. 502), and maximum costs in the Municipal Court are increased from $75 to $150 (164 M.C.C. subd. 14, as amended by L. 1951, ch. 595).

The $50 costs item in C.P.A. Sec. 1472 has been increased to $100 by L. 1951, ch. 160.

APPEALS

Upon a reversal or modification, an appellate court must now state the grounds of its decision (C.P.A. Sec. 584, subd. 1 as amended by L. 1951, ch. 595).

A new C.P.A. section 592a prevents dismissal of an appeal from an order even though a subsequent order, unappealed from, granted reargument and adhered, or granted resettlement, or denied leave to renew. (L. 1951, ch. 258). The appellate court, in its discretion, may review the subsequent order. (17 J.C.R. (1951) 205–211).

The deadly appellate trap of *People ex rel Manhattan Storage Co. v. Lilly,* 299 N.Y. 281 continues to exist, causing time to appeal to run from the date of *entry,* as against a litigant who submitted a proposed order or judgment for signature. He is deemed to have entered it himself although he is utterly ignorant of the fact of entry. This rule is nothing short of professional murder, particularly since no court possesses the power to extend the time in which to take an appeal. (*Terwilliger v. Browning, King & Co.,* 207 N.Y. 479)

There can be no stipulation for judgment absolute in divorce cases (*Weiman v. Weiman,* 295 N.Y. 150; Rule 283).

Records on appeal have been somewhat shortened (Rules 232, 234, as amended July 2, 1951. See N.Y.L.J., July 30, 1951).

For those in the higher reaches of appellate practice, two in-

teresting decisions with respect to the jurisdiction of the Court of Appeals are *Scarnato v. State,* 298 N.Y. 376 (indicating an enlargement of the Court's jurisdiction to review questions of fact) and *Gambold v. MacLean,* 254 N.Y. 357. (Presenting a case of an appeal directly to the Court of Appeals from a judgment of the Supreme Court without going through the Appellate Division, yet reviewing a determination of the Appellate Division affirming an interlocutory judgment.) (See N.Y. Const. Art. VI, sec. 7).

At the last election the people approved a new subdivision 5 for N.Y. Const. Art. VI, sec. 7. This permits an appeal to the Court of Appeals on a question of law from a non-final order in a proceeding by or against a public officer, tribunal or court. Thus an administrative tribunal need no longer stipulate for judgment absolute if the Appellate Division refuses to grant leave to appeal on a certified question.[107]

I have stipulated for judgment absolute only once in my career, specifically relying upon and endeavoring to emulate Mr. Frederick Bryan's great victory in *Curcio v. City of New York,* 275 N.Y. 20, but, alas, one should never be in a hurry about dying, getting married, resting a plaintiff's case or stipulating for judgment absolute. In the manner of Judge James Garrett Wallace's song, I was affirmed without opinion,—with appropriate overtones from Chopin.

And thus I become philosophical, endeavoring to evaluate the panorama all at once, and finding solace in the last paragraph of Glenn's work on "Liquidation" at p. 879:

> "If some of our late reforms have missed the true mark, still we have the rest of the structure; and better still, our history justifies the confidence that while the bad cannot last, the good will remain."

Indeed, the kindness of your attention has been such that I fly with enthusiasm to paraphrase a great question posed from this very rostrum almost 30 years ago, by Sir John Salmond, profound

author of Salmond on Jurisprudence: [See 22 Col. L. Rev. 197, 208 (1922)]:

> "Through centuries of slow development we have gathered together the materials for the greatest system of law that the world has ever known. Is it too much to hope that we are now approaching the end of that long era, and that, procedurally speaking, at least, we are ready to build up these materials into a stately monument of perfect form which will endure forever as one of the great contributions of this century to the cause of Truth, Justice and Civilization?"

FOOTNOTES

[1] See Finn, *"New Procedure for Old,"* 4 Fordham L. Rev. 228, 232, note 11 (May, 1935).

[2] a) In connection with a proceeding to open a private road, Sections 306 and 307 of the Highway Law actually provide for a trial without a judge. Section 306 requires a Justice of the Peace to draw a jury of twelve persons who then serve as a jury, and

> "The duties of the Justice of the Peace in connection with the proceeding shall end after the jury is sworn."

Section 307 provides that after being sworn, the jury shall view the premises, hear the allegations of the parties and witnesses, and assess damages, delivering their verdict in writing to the town superintendent,—all without benefit of jurist.

b) In the Index to Jessup-Redfield's Surrogate's Practice, there is the following definition of a "Demurrer," preserved through at least eight editions: "Demurrer. None in Surrogate's Court. (See Treatise on Snakes in Ireland)."

c) Sec. 42 of the C.P.A., unannotated for almost 30 years, calmly provides that the right of a person in possession of real property is not affected "by descent cast." To translate this, I have had to go back to Coke upon Littleton, sec. 237b, to the effect that when a person had acquired land by intrusion and died seized of the land, the descent of it to his heir took away or tolled the real owner's right of entry, so that he could only recover the land by action.

d) Another section of the C.P.A. (348a) enacted in 1939, provides for the admissibility in evidence, by reading from the cases on appeal, of testimony adduced in two actions, *Miner v. City of N. Y.* and *Sherman v. Kane,* litigated about 1878.

e) For Statutes of Limitation purposes, causes of action for breach of covenants of seizin or against encumbrances are not deemed to have accrued until there has been "an eviction, and not before" (C.P.A. sec. 11). This is hardly a statute of repose.

f) The Civil Practice Act grants jurisdiction to the Supreme Court which was

possessed and exercised by the Court of Chancery in England on July 4, 1776 (C.P.A. Sec. 64).

[8] a) Despite the tabling in 1947 of the project to extend the rule-making power of the courts, there are many interstices in the statutes where further judicial "knee-action" should be permitted by the enactment of statutory provisions comparable to C.P.A. secs. 247 and 277.

b) The "unnecessary complexity" of Interpleader in New York is apparent. Frumer, "On Revising the New York Interpleader Statutes," 25 N.Y.L. Rev. 737 (1950).

c) The Judicial Council is preparing a comprehensive revision of practice and procedure in Replevin (17th Ann. Rep. 1951, pp. 241–290).

d) And in Arbitration (pp. 213–240).

e) Appellate practice needs a general overhauling. It is much too cumbersome, treacherous and abounding in sharp quillets.

f) Should C.P.A. secs. 100 and 218 be amended to provide that an action is started upon filing a complaint?

[4] Keefe, Brooks and Greer, *"86 or 1100,"* 32 Corn. L. Q. 253, 269 (1946) Cf. *Cohen v. Beneficial Ind. Loan Corp.*, 337 U.S. 541; Keeffe, Gilhooley, Bailey and Day, *"Weary Erie,"* 34 Corn. L. Q. 494 (1949); 35 Corn. L. Q. 420 (1950); Note, *Erie RR v. Tompkins and the Federal Rules*, 62 Harv. L. Rev. 1030 (1949).

[5] Saxe, "1951 New York Civil Practice Legislation," 23 N.Y. State Bar Bull. 162–179 (June 1951); Carmody's Manual of New York Practice, *1952 Supplement*.

[6] New Trial Term Rules X in N.Y. County and XIX in Bronx County, effective Jan. 1, 1952.

[7] Announcement, N.Y.L.J. Jan. 2, 1952, p. 1.

[8] 268 N.Y. 43, 51.

[9] Medina, *Current Developments in Pleading, Practice and Procedure in the New York Courts*, 30 Corn. L.Q. 449, 465 (1945); Medina, *Recent Developments in Pleading and Practice in New York*, 32 Corn. L.Q. 313, 336 (1947).

[10] These reports are "extremely persuasive on the question of legislative intent." *Interchemical v. Mirabelli*, 269 A.D. 224, 227, 54 N.Y.S. (2) 522, 525; *Matter of Derry*, 161 Misc. 135, 291 N.Y.S. 22; *Fontheim v. Third Ave. Rwy.*, 257 A.D. 147, 12 N.Y.S. (2) 94.

[11] Clark and Wright, *The Judicial Council and the Rule-Making Power; a Dissent and a Protest*, 1 Syracuse Law Review 346–368 (Spring, 1950).

[12] Ilsen and Snyder, *Comments on the Civil Practice Act and the Judicial Council*, 23 N.Y. State Bar Bull. 120–140 (April, 1951). To these might be added Judge McCullen's excellent books on Examinations before Trial and Bills of Particulars, as well as Mr. Samuel S. Tripp's fine "Guide to Motion Practice," as supplemented for 1951–1952. See also Clark's ingenious "Annotator–Digest" of the New York Law Journal; the Law Report News; the new "Law Review Digest," in handy "Reader's Digest" form; and the Index to Legal Periodicals.

[13] Thirteenth Rep. N.Y. Jud. Council, 55, 56 (1947).

[14] See note 11, supra.

[15] See note 12, supra.

[16] Vanderbilt, Minimum Standards of Judicial Administration (1949) XVII.

[17] N.Y. Const. Art VI sec 15; Mun. Ct. Code sec 6.

[18] N.Y. Const. Art VI sec 15; City Ct. Act sec 16; Seventeenth Ann. Rep. N.Y. Jud. Council (1951) 54. The civil jurisdiction of County Courts outside N.Y. City is still only $3000, but the 1951 Legislature proposed a Constitutional Amendment

to amend N.Y. Const. Art VI sec. 11 to increase the amount to $6000 (Sen. Int. 758, Pr 761). This will undoubtedly be submitted to the Legislature of 1953.

[19] Sen. Int. 121, Pr. 121, to amend N.Y. Const. Art VI secs. 1, 2, and 16 and add sec. 15a.

[20] 1951 Sen. Int. 1378, Pr. 1408.

[21] L. 1951, Ch. 832, amending Jud. Law, sec. 189 subd. 3.

[22] L. 1951, Ch. 716.

[23] L. 1951, Ch. 764, amending J.C.A. secs. 3, 4, 109, 141, 264 and 267 effective Jan. 1, 1952.

[24] L. 1951, Ch. 150, amending C.P.A. sec. 67 subd. 1.

[25] L. 1951, Ch. 610, adding Real Prop. L. secs. 500a, 506a and 506b. See Rep. Law Rev. Comm. (1951) or 1951 N.Y. Leg. Doc. No. 65K. This eases the stringency resultant form the shortening in 1938 and 1941 of the periods of limitation from 20 to 6 years. See saving clauses, however.

[26] L. 1951, Ch. 522, adding Dec. Est. L. sec. 160.

[27] Vehicle and Traffic L. secs. 51, 51a. *Leighton v. Roper* 300 N.Y. 434. See also *Ferguson v. Harder*, 141 Misc. 466, 252 N.Y.S. 783; *In re De Baun's Will*, (1937) 293 N.Y.S. 836, 838; *Rogers v. Gould*, 229 N.Y. 363.

[28] C.P.A. sec. 11. Note that in 1941 the indicated language was deleted from C.P.A. sec. 47a, but transferred to sec. 11 (L. 1941 Ch. 329). See N.Y. Leg. Doc. (1941) No. 65M. I am indebted to Professor Joseph McGovern for impressing upon me the anachronism of preserving this language.

[29] C.P.A. sec. 335.

[29a] C.P.A. secs. 47, 47a.

[30] C.P.A., sec. 47b; N. Y. Leg. Doc. 1950, No. 65H (in 1950 Report of Law Revision Commission, pp 193–219). See N.Y. Const. Art VII, sec 8; Art VIII, sec. 1; *Campbell v. Holt*, 115 U.S. 620; *Gallewski v. Hentz*, 301 N.Y. 164; *Williamsburgh Sav. Bank v. State of N.Y.*, 243 N.Y. 231.

[30a] See 1951 Leg. Doc. No. 65.

[31] *Fish v. Conley*, 221 A.D. 609, 225 N.Y.S. 27; Black *v. Van Aiken*, 224 A.D. 759, 230 N.Y.S. 803.

[32] See Leg. Doc. (1943) No. 65–F; and Laws of 1943, Chapter 516.

[33] The action was one for wrongful death under the Jones Act, (46 U.S.C. 688) which requires that an action be "commenced within three years from the day the cause of action accrued." Decedent drowned on Sept. 29, 1946. The summons was delivered to the Sheriff of N.Y. County on Sept. 28, 1949. Service on an officer of defendant was made in N.Y. County on Oct. 19, 1949. In the Federal Court an action is started by the filing of a complaint (Rule 3, F.R.C.P.) Defendant claimed that C.P.A. sec. 17 applies only to an action the limitation of time of which is governed by the Civil Practice Act. The Court brushed this contention aside, as indicated by the quotation in the text.

[34] This opinion will appear in tomorrow's New York Law Journal (January 11, 1952). See also L. Rep. News, Dec. 27, 1951.

[35] Holtzoff, J., in *Segal v. Travelers Ins. Co.* 94 Fed. Supp. 123.

[36] *Ogino v. Black*, 278 A.D. 146, 104 N.Y.S. (2) 82; *Lunn v. Andrews*, 268 N.Y. 538, affg. 152 Misc. 568, 274 N.Y.S. 432; *Meaney v. Keating*, (Misc.), 102 N.Y.S. (2) 514; *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 434.

[37] *Middleton v. City of New York*, 300 N.Y. 732, affg. 276 A.D. 780, 92 N.Y.S. (2) 655; *Schwartz v. Merola*, 290 N.Y. 145, 156 (No contract of indemnity; secondary wrongdoer allowed to claim over upon common law principles); *Phoenix Bridge Co.*

v. Creem 185 N.Y. 580, 102 A.D. 354, 92 N.Y.S. 855; *Iacono v. Frank*, 259 N.Y. 377, 381–382 (No duty resting upon an owner to inspect the machinery or tools furnished by a subcontractor); *Coughlin v. Bisceglia* (Special Term, Kings County, 1950, DiGiovanna, J. 100 N.Y.S. (2) 738 (Complaint based solely on active negligence; third-party complaint not based on right to indemnification. Third-party complaint dismissed). In one interesting case, *Tipaldi v. Riverside*, 298 N.Y. 266, affg. 273 A.D. 414, 78 N.Y.S. (2) 212 a plaintiff sued two *passive* "wrongdoers," an owner and a general contractor. The court found them not in pari delicto, and held that the general contractor must indemnify the owner on the basis of the "relative delinquency" of the parties Cf. *Foreman v. Udell* 267 A.D. 823, 45 N.Y.S. (2) 813 and *Logan v. Bee Builders* 277 A.D. 1040, 100 N.Y.S. (2) 284.

[38] *Pugni v. Lanning* 196 Misc. 335, 92 N.Y.S. (2) 21. Cf. *Shass v. Abgold* 277 A.D. 346, 100 N.Y.S. (2) 121 and *Bonn v. Jacob Kotler Inc.* 107 N.Y.S. (2) 283 (All defendants joint tortfeasors in pari delicto. Claim over under Sec. 264 C.P.A. not allowed).

[39] *Polsey v. Waldorf-Astoria*, 216 A.D. 86, app. dism. 243 N.Y. 533; *Klepper v. Seymour*, 246 N.Y. 85; Cf. *Sherlock v. Manwaren*, 208 A.D. 538, 203 N.Y.S. 709.

[40] Clark, Code Pleading, 2nd ed. 1947, p. 448–449. Cf. *Hurn v. Oursler*, 289 U.S. 238; *Dioguardia v. Durning*, 139 Fed. (2) 774; *Abrams v. Maryland Gas. Co.*, 300 N.Y. 80.

[41] For a remarkable pre-Ikle law review article on Election of Remedies, see 38 Col. L. Rev. 292.

[42] Arkansas, Delaware, Hawaii, Kentucky, Maryland, New Mexico, North Carolina, Rhode Island, South Dakota.

[43] Pennsylvania, Minnesota, Wisconsin.

[44] *U.S. v. Yellow Cab Co.* 340 U.S. 543. The reasoning against contribution is that it allows defendants who could distribute the loss over society "to cast it back instead onto the shoulders of individuals who cannot distribute it at all." James. *"Contribution Among Joint Tort Feasors: A Pragmatic Criticism."* 54 Harv. L. Rev. 1156. I prefer the contrary rationale of Gregory's *"Defense"* in 54 Harv. L. Rev 1170, and of such authorities as *George's Radio v. Capital Transit Co.*, 126 Fed (2) 219, Prosser on Torts, 1111 and 1 Cooley on Torts, 4th ed. 297, 298.

[45] C.P.A. sec. 222a Cf. C.P.A. secs. 1197, 1198.

[46] *Kirkman v. Westchester Newspapers*, 287 N.Y. 373.

[47] *Martin v. Curran*, 303 N.Y. 276.

[48] Ibid.

[49] *Emmons v. Hirschberger*, 270 A.D. 1025, 63 N.Y.S. (2) 48; *Bennett v. Bird*, 237 A.D. 542, 261 N.Y.S. 540.

[50] *Di Perna v. Black*, 187 Misc. 437, 62 N.Y.S. (2) 69.

[51] *Sterling v. Frank*, 299 N.Y. 208, 209. Cf. *Int. Shoe Co. v. Washington*, 326 U.S. 310 (1945).

[52] See Leg. Doc. (1949) No. 65B; *Frank L. Young Co. vs. McNeal-Edwards Co.*, 283 U.S. 398; *Adam v. Saenger*, 303 U.S. 59.

[53] See Leg. Doc. (1940) No. 65 (D); (1941) No. 65 (N); *Yeckes-Eichenbaum v. McCarthy*, 290 N.Y. 437.

[54] *Interchemical Corp v. Mirabelli*, 269 A.D. 224, 54 N.Y.S. (2) 522. Cf. *Henry L. Doherty & Co. v. Goodman*, 294 U.S. 623; *Int. Shoe Co. v. Washington*, 326 U.S. 310; *Flexner v. Farson*, 248 U.S. 289; 28 Yale Law J. 259.

[54a] *Amon v. Moreschi*, 296 N.Y. 395.

[66] *Milliken v. Meyer*, 311 U.S. 457, 462–3; 15 N.Y. Jud. Council Rep. 60–62 (1949). Cf. C.P.A. sec. 520.

[67] *Dirksen v. Dirksen*, (Misc.), 72 N.Y. S. (2) 865. Cf. C.P.A. sec. 520.

[68] *Garfein v. McInnis* 248 N.Y. 261; *Feuchtwanger v. Central Hanover Bank*, 288 N.Y. 342.

[69] *Geary v. Geary*, 272 N.Y. 390; Cf. *Dimmerling v. Andrews*, 236 N.Y. 43.

[70] *Morris Plan v. Gunning*, 295 N.Y. 324.

[71] *Garvin v. Garvin*, 302 N.Y. 96, rvg. *Goldstein v. Goldstein*, 283 N.Y. 146.

[72] 301 N.Y. 13.

[73] *Hanna v. Stedman*, 230 N.Y. 326.

[74] *Friedberg v. Santa Cruz*, 274 A.D. 1072, 86 N.Y.S. (2) 369; 28 U.S.C. 1251; *De Simone v. Transportes Martimos do Estado*, 200 A.D. 82, 191 N.Y.S. 864. Cf. *Herman v. Apetz*, 130 Misc. 618, 224 N.Y.S. 389.

[75] Effective Sept. 1, 1951. See 126 N.Y.L.J. No. 47, p. 1, Sept. 6, 1951.

[76] Frumer and Graziano, "Jurisdictional Dilemma of the Non-resident Defendant in New York," 19 Fordham L. Rev. 125 (1950). Cf. *Brainard v. Brainard* 272 A.D. 575, 74 N.Y.S. (2) 1, affd. o.g. 297 N.Y. 916.

[77] 15 N.Y. Jud. Council Rep. 62 (1949); 16 N.Y. Jud. Council Rep. (1950) 66–69, 185–217; 17 Jud. Council Rep. (1951) 58–64.

[78] Dec. Est. L., sec. 131.

[79] *McGann v. Adler*, 241 A.D. 726, 270 N.Y.S. 915. Plaintiff unfamiliar with facts. Bill allowed. Cf. *Egan v. Tishman*, 222 A.D. 141, 144, 225 N.Y.S. 631, 634. (Plaintiff familiar with the facts. Bill denied.)

[80] *Rafferty v. State*, 16 N.Y.S. (2) 685, 687.

[81] *Lee v. Troy*, 98 N.Y. 115, 119; *Klein v. Burleson*, 138 A.D., 405, 122 N.Y.S. 752. Cf. *Rafferty v. State*, 261 A.D. 80, 24 N.Y.S. (2) 689, affg. 172 Misc. 870, 16 N.Y.S. (2) 685; *Zaepfel v. Parmass*, 140 Misc. 539, 250 N.Y.S. 740.

[82] *Bricken Constr. Corp. v. Cushman*, 163 Misc. 371, 297 N.Y.S. 194; *Scientific, etc. Corp. v. Bd. of Educ.*, 172 Misc. 770, 16 N.Y.S. (2) 91.

[83] *Binon v. Boel*, 271 A.D. 505, 66 N.Y.S. (2) 425.

[84] *Rosner v. Globe Valve Corp.* 276 A.D. 462, 95 N.Y.S. (2) 531.

[85] Declaration, plea, replication, rejoinder, surrejoinder, rebutter, surrebutter (Carmody's Manual of N.Y. Civil Practice, 1946 ed. p. 317.)

[86] Cf. *Blessington v. McCrory Stores Corp.*, 195 Misc. 710, 91 N.Y.S. (2) 73, 75.

[87] *McQuade v. Prudential Ins. Co.*, 166 Misc. 524, 2 N.Y.S. (2) 647; *Wallace v. Baring*, 2 A.D. 501, 37 N.Y.S. 1079.

[88] *Zinner v. Louis Meyers & Son Inc.*, 181 Misc. 344, 43 N.Y.S. (2) 319.

[89] *Union Equities Inc. v. Silk*, 73 N.Y.S. (2) 450; *Chance v. Guaranty*, 256 A.D. 840, 9 N.Y.S. (2) 478, 480.

[90] *Leonard v. Wargon*, 55 N.Y.S. (2) 626; *Ocean A & G Corp. v. Marcus Contr. Co. Inc.*, (App. Div. First Dept.), 234 N.Y.S. 854; *Schact v. Schact*, 58 N.Y.S. (2) 54, 62; *Fidelity & C. Co. Inc. v. Tar Asphalt Tr. Co. Inc.*, 30 Fed. Supp. 216. Cf. *Bishop v. Bishop*, 195 Misc. 182, 91 N.Y.S. (2) 207 (Deposition of husband's employer as to husband's earnings).

[91] *Singer v. Nat. Gum & Mica Co.*, 211 A.D. 758, 208 N.Y.S. 1; *Ortman v. Beiley*, 160 A.D. 258, 145 N.Y.S. 541; *Redmond v. Stoneham*, 182 A.D. 307, 169 N.Y.S. 239; *Marsh v. Russeks*, 78 N.Y.S. (2) 64; *Raleigh v. City*, 264 A.D. 776, 34 N.Y.S. (2) 685; *Dastis v. Sydell*, 76 N.Y.S. (2) 569.

[92] *Zeltner v. Fidelity*, 220 A.D. 21, 220 N.Y.S. 356; *Beeber v. Empire*, 260 A.D. 68, 20 N.Y.S. (2) 584.

[83] *Mattison v. Mattison*, 203 N.Y. 79. Cf. *Goldman v. U.S.*, 316 U.S. 129. Although see *Bata v. Chase Safe Dep. Co.*, 99 N.Y.S. (2) 535, 579.

[84] *Michel v. Tsirkas*, 251 A.D. 742, 296 N.Y.S. 96; *Clark v. Amer. Press Assn.* 166 Misc. 471, 2 N.Y.S. (2) 672; *Raleigh v. City of N. Y.*, 264 A.D. 776, 34 N.Y.S. (2) 685; *Royce v. Ziegfeld*, 224 A.D. 651, 229 N.Y.S. 22; *Sasson v. Lichtman*, 277 A.D. 368, 100 N.Y.S. (2) 297.

[85] *Tibbetts v. Sternberg*, 66 Barb. (N. Y.) 201; *Miller v. Greenwald*, 192 A.D. 559, 562, 183 N.Y.S. 97; Matter of Hewett, 271 A.D. 1054, 70 N.Y.S. (2) 3. Assurance of offer in evidence, moreover, need *not* be given as a condition precedent to the right to inspect. *Miller v. Greenwald*, 192 A.D. 559, 183 N.Y.S. 97, 98.

[86] *Fey v. Wisser*, 206 A.D. 520, 202 N.Y.S. 30; In re Dimon's Estate, 155 Misc. 311, 280 N.Y.S. 526; *Guardian v. Hartstein*, 256 A.D. 917, 10 N.Y.S. (2) 859.

[87] *Wildermuth v. Keating*, 269 A.D. 783, 55 N.Y.S. (2) 110; *Mauser v. Sclar*, 278 A.D. 661, 102 N.Y.S. (2) 565. Cf. *Jaffe v. City of N. Y.*, 196 Misc. 710, 94 N.Y.S. (2) 60.

[88] *Berdell v. Berdell*, 86 N.Y. 519, 521; *Redfield v. Nat. Petroleum Corp.*, 211 A.D. 152, 206 N.Y.S. 827; *Goell v. U. S. Life Ins. Co.*, 265 A.D. 735, 40 N.Y.S. (2) 779; C.P.A. secs. 303, 304.

[89] *People v. Kenney*, 167 Misc. 51, 3 N.Y.S. (2) 348 (1938). See Summers, "Science Can Get the Confession" (1939) 8 Fordham L. Rev. 334; Cf. *Comr. of Welfare v. Castonie*, 277 A.D. 90, 97 N.Y.S. (2) 804.

[90] *People v. Forte*, 167 Misc. 868, 4 N.Y.S. (2) 913 (1938).

[90] *Rochin v. People of the State of California*, decided Jan. 2, 1952, 20 U. S. Law Week 4057, Jan. 2, 1952; 101 Cal. App. (2) 140, 225 Pac. (2) 1; cert. granted 341 U.S. 939, Frankfurter, J.: "We*** put to one side cases which have arisen in the State courts through the use of modern methods and devices for discovering wrongdoers and bringing them to book." Cf. *Holt v. U. S.*, 218 U. S. 245, 252–253.

[91] *Rochin v. People*, note 90 supra.

[92] *Ecco High Frequency Corp. v. Amtorg Tr. Corp.*, 276 A.D. 837, 93 N.Y.S. (2) 178, affg. 196 Misc. 405, 94 N.Y.S. (2) 400; *Matter of Grauds*, 180 Misc. 558, 45 N.Y.S. (2) 318. Cf. Rule 126, and Tripp, *A Guide to Motion Practice*, 1951–1952 Supplement, pp. 76–80.

[93] *Belfer v. Dectograph Prods., Inc.*, 275 A.D. 824, 89 N.Y.S. (2) 125; *Langan v. First Trust & Dep. Co.*, 296 N.Y. 1014, affg. 270 A.D. 700, 62 N.Y.S. (2) 440.

[94] *Stevenson v. News*, 302 N.Y. 81; *Lloyd v. R.S.M. Corp.*, 251 N.Y. 318; *Kidder v. Hesselman*, 119 Misc. 410, 196 N.Y.S. 837.

[95] *N. Y. State Bar Bulletin*, (Dec. 1951) vol. 23, No. 6, pp. 452–457.

[96] See *U. S. v. Manton*, 107 Fed. (2) 834, 844. Brief for Manton, pp. 72–77, Brief for Spector, pp. 35–37; Model State Banking Code, Sec. 2. 111 F. Cf. *U.S. v. Kushner*, 135 Fed. (2) 668; *U. S. v. Karbney*, 155 Fed. (2) 795; *Cipullo v. U. S.*, 170 Fed. (2) 311; *Myers v. U. S.*, 174 Fed. (2) 329.

[97] Dec. Est. L., sec. 133; In re Sintyago's Estate, 100 N.Y.S. (2) 556; Matter of Kaiser, 100 N.Y.S. (2) 218. The formulae of these cases are hardly conclusive. Dependency of crippled children, for example, may extend far beyond majority.

[98] *People v. Riccardi*, 285 N.Y. 21.

[99] 41 Journal of Criminal Law and Criminology, 192–198 (July–Aug. 1950), "*Cross-examining the Expert Witness with the Aid of Books.*" See *Stone v. Seattle*, 33 Wash. 644, 74 Pac. 808.

[100] Morgan, 29 Texas Law R. (May, 1951) 587–610.

[101] *Kye v. Stearns*, 130 Misc. 281, 223 N.Y.S. 582; *City v. Int. Rapid Tr. Co.*, 134 Misc. 827, 236 N.Y.S. 449.

[102] L. 1951 Ch. 218. Cf. *Herpe v. Herpe*, 225 N.Y. 323, 327. See also amendments of 1951 to C.P.A. Secs. 550 and 551. Cf. Rule 220 and Rule 221, as amended July 28, 1951. See N.Y.L.J. Sept. 6, 1951.

[103] C.P.A. sec. 549. See Seventeenth (1951) Rep. N. Y. Jud. Council, pp. 72–73 and 179–204. Sec. 549 provides that the time for making the motion is to be "prescribed by the rules of civil practice." Supplementing this, a new Rule 60a fixes the time at fifteen days from the rendition of a verdict or decision, or if no verdict is returned, from the time of discharge of the jury; and in a non-jury case, 15 days from the date of rendering the decision. Thus "the same term" is no longer the time limit. (See N. Y. L. J., Sept. 6, 1951, for text of new Rule 60a.)

[104] *McDonald v. Pless*, 238 U.S. 264; *Payne v. Burke*, 262 N.Y. 630; *Miller v. Mattern*, 149 Misc. 883, 268 N.Y.S. 296, affd. 241 A.D. 782, 270 N.Y.S. 1002; *Gambon v. New York*, 153 Misc. 401, 274 N.Y.S. 653; *Wirt v. Reed*, 138 A.D. 760, 123 N.Y.S. 706.

[105] *McHugh v. Jones*, 283 N.Y. 534; *People v. Leonti*, 262 N.Y. 256; *Wilkins v. Abbey*, 168 Misc. 416, 5 N.Y.S. (2) 826; *Reed v. Cook*, 103 N.Y.S. (2) 539.

[106] *Steel Co. v. Assoc. Metals*, 277 A.D. 687, 102 N.Y.S. (2) 655; *Mason v. Lory Dress Co.*, 277 A.D. 660, 102 N.Y.S. (2) 285, 655; *Shaffer v. Martin*, 20 A.D. 304, 46 N.Y.S. 992; *Querze v. Querze*, 290 N.Y. 13; *Amer. Tobacco Co. v. SS Katingo* —Fed (2) —, (C.C.A. (2) Sept. 13, 1951,) N.Y.L.J. Oct. 26, 1951; *U. S. v. Crescent Amusement Co.* 323 U.S. 173, 185; *U. S. v. Forness*, 125 Fed. (2) 928, 942, 943.

[107] See Matter of *Rochester Gas & Elec. Corp. v. Maltbie*, 298 N.Y. 680, 867; Matter of *Epstein v. Board of Regents*, 295 N.Y. 154, 157; Benjamin, Administrative Adjudication in New York, 366–368 (1942).

Marka, Come Up and See My Etchings!

A Review by HARRIS STEINBERG

The other evening, mooning around in the throes of an unrequited love for Miss Denise Darcel, contracted at the Association's "Twelfth Night Party" for Harrison Tweed, I sought surcease in a new mystery novel, entitled "The Corpse Died Twice."* Settling down with the book, a box of Cheese Niblets, and a magnum of Dr. Brown's Celery Tonic, I quickly succeeded in forgetting my passion for Miss Darcel; the trouble is, at the same time, I feel deeply in love with Miss Marka De Lancey, the lady-lawyer heroine of the book!

The first page spelled my doom. In it, Miss De Lancey makes her appearance at the House of the Association—she is a member—in order to view the Members' Art Exhibit. She is described as having "copper-colored hair, dark, intensely lucent eyes with odd gold flecks" in them, and one gathers from random remarks by various male characters in the book that she is extraordinarily well-stacked. Simpering to myself, and grasping a double handful of Cheese Niblets, I continued to read. An angry flush rose to my cheeks when I read that she is accosted on Bar Association premises by a character, "certainly no lawyer," dressed in a corduroy jacket, slacks, and wine-colored suede sandals, while she is gazing at a "group of etchings, courtroom scenes," by which she was "much amused."

Miss De Lancey then addresses the masher as follows:

> "Those etchings, aren't they really wonderful? That judge! And the satire—it has a bite almost like a Daumier. Remarkable, don't you think?"

Knowing darn well whose etchings she was referring to, I held

* "The Corpse Died Twice," by Barbara Frost. Coward-McCann. 186 pp. $2.50.

my breath, fearing lest the oaf should break the spell. His answer finally came:

> "He didn't answer at once and the silence lengthened, to seem deliberate. He said abruptly, '*That* one's good. Really professional. Harris Steinberg, I've seen his stuff before. Color's done in a single impression through the press . . .' He described the process."

Immediately revising my opinion of the man, who turns out to be an artist of ability and perception, I continued to read, dropping Niblets from my nerveless fingers, and found that three weeks after this meeting, Miss De Lancey was in her law office, receiving a messenger who had come to

> "bring her one of the Harris Steinberg etchings. It was the one she'd admired most of the group, and she'd bought it for her office wall."

Loosening my collar and making mental calculations of the profits on this sale, I finished the Celery Tonic at one gulp, and proceeded to complete the book at one sitting, marvelling at Miss De Lancey's beauty, grinning proudly and fatuously at her incisive reasoning, and mewing piteously in alarm when her safety is threatened. At the end, I was limp, but hopeful. While I could never have dared aspire to meet Miss Darcel in the flesh, there is a chance of my getting to Miss De Lancey, even though she is a fictional character. Thus, on the flyleaf of the book is a notation that "all scenes, characters, and events portrayed in this novel are entirely imaginary." If I am, by definition, imaginary too, maybe I shall meet her some day, on some astral plane on 44th Street!

Members of the Association who like mystery novels should find this one doubly entertaining. The legal background is accurate—a real rarity—and the plotting is careful and logical. Clues are fairly and sufficiently planted, leading to the murderer. Miss De Lancey, a young lawyer of considerable charm, helps

solve three murders, while almost becoming a victim herself of another. The action takes place in Coney Island, and the author displays a detailed knowledge of the backstage life in that Brooklyn spa.

It is certainly to be hoped that Miss De Lancey will appear again in new exploits as engaging and exciting as those involved here. Miss Marka De Lancey is, by all odds, a gay, decorative and desirable addition to the membership of the Association, and would seem to be just what Harrison Tweed had in mind when he initiated the 44th Street Renaissance several years ago. When she gets drenched in a sudden rainstorm, she ruminates that it is "nothing a rye-and-soda wouldn't fix." On her way to an Association committee meeting, she buys a fetching new hat:

> "'*Ecoutez!* Madame recovered herself and rescued a hat from the pile. It was lovely, no? With the small green roses?'
> "Marka agreed reluctantly.
> "'Once more, you try it. Green roses, with your hair? *Superbe!* This Association, how you say, *Compagnie de la Bar?* Who goes there?'
> "'Lawyers.'
> "'Ah, *les avocats!* Men, no?'
> "'Most of them, yes.'
> "'Ah-h-h!' Mme Claude's triumphant shrug was all expressive."

It would seem a safe bet that the committee in question did very little serious work at that meeting.

But Marka is also devoted to the highest traditions of ethical practice fostered by the Association. When Lieutenant MacRae, the policeman with whom she solves the case, shows her a lurid newspaper account of her activities, she recoils in horror:

> "She gave it one glance and exclaimed in horror. 'The

Bar Association. Publicity like this! I'm a new member, they—.'

"' Don't let it throw you, they won't be too upset.' He added dryly, 'not when they read the story that goes with it.'"

For next President of the Association, gentlemen, I give you Marka De Lancey! On second thought, I'll keep her myself.

Harris B. Steinberg

Review of Recent Decisions of the United States Supreme Court

By Joseph Barbash and Robert B. von Mehren

THE LORAIN JOURNAL CO. ET AL. V. U. S.

(December 11, 1951)

The Lorain Journal Company publishes daily except Sunday, in Lorain, Ohio, a newspaper called the Journal. Since 1932 the Journal has been the only daily paper published in that city. Its daily circulation in Lorain is over 13,000 copies; it reaches 99% of the families resident in that city.

From 1933 to 1948 the Journal enjoyed a substantial monopoly in Lorain of the mass dissemination of news and advertising, both of a local and national character. In 1948 a competitor appeared. In that year the FCC granted a license to radio station WEOL, located at Elyria, Ohio, eight miles south of Lorain.

Disturbed by this nascent competition, the Journal Company and several of its officers conceived a plan designed to eliminate the threat of WEOL. Acting pursuant to this plan, the Journal Company refused to accept advertisements in the Journal from any local Lorain County advertiser who advertised or who was about to advertise over WEOL. This course of action, characterized by the trial court as "bold, relentless, and predatory commercial behavior" (92 F. Supp. 794, 796) had as its purpose the destruction of WEOL. It threatened "the very existence of WEOL" by attacking "one of its principal sources of business and income." *Id.* at 799.

The United States moved to correct this situation by instituting a civil antitrust action against the Journal Company and four of its officers. Its complaint alleged that the corporation, together with the defendant officers, was engaging in a combination and conspiracy in restraint of interstate commerce in violation of Section 1 of the Sherman Act, and in a combination and conspiracy to monopolize such commerce in violation of Section 2 of the Act. It also charged an attempt to monopolize such commerce in violation of Section 2. After a trial, the District Court, confining itself to the last of these allegations, found that the defendants were engaging in an attempt to monopolize in violation of Section 2. It enjoined them from continuing this attempt and retained broad powers of supervision. *United States v. Lorain Journal Co. et al.*, 92 F. Supp. 794 (N. D. Ohio 1950). Thereafter, the defendants brought this appeal directly to the Supreme Court. The Court in a unanimous opinion written by Mr. Justice Burton, Mr. Justice Clark and Mr. Justice Minton not participating, affirmed the District Court's judgment.

In their attempt to upset the lower court's injunction, the appellants made

four principal arguments: (1) That their conduct was concerned with wholly local business and, therefore, could not constitute an attempt to monopolize interstate commerce; (2) that the United States had not shown that WEOL had been driven out of the market; (3) that the injunction constituted a "prior restraint" upon the freedom of the press in violation of the First Amendment; and (4) that the visitation provisions of the decree were unnecessarily broad.

Each of these arguments was rejected by the Supreme Court. Its answer to the first argument was that the conduct complained of was concerned with interstate commerce. This answer was based upon the conclusion "that the immediate dissemination of news gathered from throughout the nation or the world by agencies specially organized for that purpose is a part of interstate commerce" and that the "same is true of national advertising originating throughout the nation and offering products for sale on a national scale."

The Court was not impressed by the fact that "success had [not] rewarded appellants' attempt to monopolize" and that WEOL had not been driven out of business. To establish a violation of Section 2 it was enough to show that there was a "'dangerous probability'" of the forbidden result. The destruction of WEOL would permit the Journal Company to re-establish the monopoly position that it had enjoyed before 1948. Injunctive relief under Section 4 of the Sherman Act was an appropriate remedy to prevent this proscribed event.

The Court disposed of the appellants' freedom of the press argument in a short paragraph. It held that the injunctive relief provided for by Section 4 of the Sherman Act "is as appropriate a means of enforcing the Act against newspapers as it is against others." It is no restriction upon any "guaranteed freedom of the press" to enjoin a publisher from accepting or denying advertisements when the conduct is part of an attempt to monopolize interstate commerce.

The rejection of the appellants' final contention was on the ground that the terms of the decree did not constitute "obvious error." Since the entire record of the proceedings below in this case was not before it, the Supreme Court was "content to rely upon the trial court's retention of jurisdiction over the cause for whatever modification the decree may require in the light of the entire proceedings and of subsequent events." The Court warned, however, that injunctions should not impose unnecessary restrictions and that the procedures prescribed for supervision should not be unduly burdensome.

The real importance of the instant case is perhaps not to be found in the specific holdings considered above. Lurking in the interstices of the opinion is one point of large significance. It now seems clear that seven members of the present Court are willing to accept *United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533 (1944) (a 4–3 decision). The Court cites that case as overruling the "line of cases holding 'that policies of insurance are not articles of commerce, and that the making of such contracts is a mere incident of commercial intercourse.'" Thus the position of Mr. Justice Reed on this

issue is clarified, the authority of the *South-Eastern Underwriters* case is firmly established and that case is extended and made applicable to contracts other than contracts of insurance.

KEROTEST MANUFACTURING CO. V. C-O-TWO FIRE EQUIPMENT CO.

(January 2, 1952)

On January 17, 1950, C-O-Two, a Delaware corporation with offices in Newark, N. J., commenced in the District Court for the Northern District of Illinois an action against the Acme Equipment Company, a customer of Kerotest, for "'making and causing to be made and selling and using'" devices which infringed C-O-Two's patents.

Thereafter, on March 9, 1950, Kerotest, a Pennsylvania corporation with its offices in Pittsburgh, began in the District Court of Delaware the instant proceeding against C-O-Two. It sought a declaratory judgment that the patents sued upon by C-O-Two in the Illinois action were invalid and that the devices which Kerotest manufactured and supplied to Acme did not infringe the C-O-Two patents.

On March 22, 1950, C-O-Two amended its complaint in the Illinois action so as to join Kerotest as a defendant. It then moved in the Delaware Court for a stay of the declaratory judgment proceeding.

Kerotest countered by asking the Delaware Court to enjoin C-O-Two from prosecuting the Illinois suit "'whether as against Kerotest alone, or generally, as [it might] deem just and proper.'" The Delaware Court stayed the proceeding before it and refused to enjoin that in Illinois, subject to re-examination of the questions after 90 days. Kerotest appealed and the Court of Appeals for the Third Circuit affirmed.

By the time the 90 day period had elapsed, the Illinois District Court had permitted the joinder of Kerotest as a defendant and had denied a motion by Acme to stay the Illinois proceeding pending disposition of the Delaware suit.

At the end of the 90 days, both C-O-Two and Kerotest renewed their motions in the Delaware proceeding, with Kerotest modifying its motion to ask only that C-O-Two be enjoined from prosecuting the Illinois proceeding as to Kerotest. The Delaware Court, a different judge sitting, enjoined C-O-Two from proceeding in the Illinois suit against Kerotest and denied the stay of the Delaware action. These conclusions were premised "on the assumption that rulings by its own and other Courts of Appeals required such a result except in 'exceptional cases,' since the Delaware action between C-O-Two *and* Kerotest was commenced *before* Kerotest was made a defendant in the Illinois suit." (Italics added.)

On appeal the Third Circuit reversed, saying in part:

> "'. . . the whole of the war and all the parties to it are in the Chicago theatre and there only can it be fought to a finish as the litigations are

now cast. On the other hand if the battle is waged in the Delaware arena there is a strong probability that the Chicago suit nonetheless would have to be proceeded with for Acme is not and cannot be made a party to the Delaware litigation. . . .'"

On rehearing the Court of Appeals sitting *en banc* adhered to the views expressed in the opinion of the earlier three-judge court. Two judges dissented. 189 F. 2d 31 (1951).

The Supreme Court granted certiorari "Inasmuch as a question of importance to the conduct of multiple litigation in the federal judicial system was involved." It affirmed the Third Circuit, the Chief Justice and Mr. Justice Black dissenting without opinion.

The majority, Mr. Justice Frankfurter writing the opinion, felt that the problem of coordinating the efforts of different courts in the conduct of multiple litigation did not admit of a "rigid mechanical solution." It reasoned that the relevant factors were "equitable in nature." Hence, it held that "Even if we had more doubts than we do about the analysis made by the Court of Appeals, we would not feel justified in displacing its judgment with ours."

The effect of the Supreme Court's decision is apparently to make the time sequence in which court proceedings are instituted only one factor to be considered in determining which one of multiple suits shall be tried first. Since this question is "equitable in nature," the timing of the actions will be considered along with all the other equities of the situation. However difficult of application this rule may be, it would seem to be more consistent with conservation of judicial energy and comprehensive disposition of litigation than a rule based upon time alone. In any event, now that the Supreme Court has established the more flexible rule, it is unlikely that it will consider the problem again unless a case arises in which there has been a flagrant abuse of discretion by the lower courts.

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION V. JUNEAU SPRUCE CORPORATION

(January 7, 1952)

Together Section 303(b) and Section 303(a)(4) of the 1947 Labor Management Relations Act specifically give an employer an action for damages in the district courts of the United States against a labor organization engaging in certain kinds of secondary boycotts and jurisdictional strikes. Section 8(b)(4)(D) of the Act in almost the same terms makes the same conduct an unfair labor practice concerning which the National Labor Relations Board may make a finding under Section 10(k) and issue a cease and desist order under Sections 10(b) and 10(c). In its first consideration of a Taft-Hartley damage action the Supreme Court, Mr. Justice Douglas writing the opinion,

decided unanimously that an employer's right to collect damages did not depend upon an unfair labor practice finding by the Board.

The employer Juneau, a sawmill owner operating under a collective bargaining agreement with the International Woodworkers of America, used its own sawmill employees to load its barges carrying the mill's product from Alaska to ports in Canada and the United States. Local 16 of the International Longshoremen's Union demanded that Juneau use instead its longshoremen members to load the barges. When Juneau refused, it set up picket lines which most of the sawmill workers would not cross, and the mill shut down. The mill then reopened for a time, though picketing continued, but it was forced to shut down again when Local 16's parent International Longshoremen's Union caused its longshoremen in Canada and the United States to refuse to unload Juneau's barges.

Juneau filed a Labor Board charge against Local 16 alleging violation of Section 8(b)(4)(D), and the Board eventually issued a cease and desist order against the Local. In the meantime, however, Juneau had brought suit in the Alaska District Court seeking damages against both the Local and the International. A jury awarded Juneau $750,000, based on damages from the commencement of the picketing. The Court of Appeals for the Ninth Circuit affirmed. 189 F. 2d 177.

The Supreme Court first had to decide whether the District Court for Alaska had jurisdiction under Section 303(b). The Alaska court is a "legislative" court, rather than one created under Article III of the Constitution, and a number of cases have held that these "legislative" courts are not within the term "district courts of the United States" in other statutes. The Court held here, however, that the Alaska Court had jurisdiction because the Congressional purpose is "more closely approximated . . . by giving the historic phrase a looser, more liberal meaning in the special context of this legislation."

The Unions' principal contention in the Supreme Court was that if Section 303(a)(4) were properly read in the light of Section 8(b)(4)(D) damages could be awarded only on the basis of picketing occurring after the Board had determined such picketing was an unfair labor practice. To bolster their argument, they pointed out that under Section 10(k) the Board itself could not issue a cease and desist order until it had made both an unfair labor practice finding and an attempt to obtain a voluntary adjustment of the dispute.

The Court summarily dismissed this contention. It not only saw no language in Section 303(a)(4) suggesting this limitation, but it found a contrary inference in the fact that the acts proscribed by Section 303(a)(4) were specifically rendered unlawful "for the purposes of this section only." Moreover, since Section 8(b)(4)(D) gives rise to the remedy of an administrative finding which can be the basis of a cease and desist order, and Section 303(a)(4) gives rise to the different remedy of a judgment for damages, "the fact that the two sections have an identity of language . . . is strong confirmation of our

conclusion that the remedies provided were to be independent of each other."

The argument based on the requirement of Section 10(k), that the Board make a finding and attempt to adjust the dispute before issuing a cease and desist order, was also shortly rejected. Section 10(k) was, the Court said, "only a limitation on administrative power," which "had no counterpart in the provision for private redress."

If the remedies arising from Section 8(b)(4)(D) and Section 303(a)(4) are indeed "independent of each other," it would appear to be irrelevant that the Board in fact eventually made a 10(k) determination adversely to Local 16 and eventually issued a cease and desist order. Conceivably the Board and district courts could reach different conclusions on the same facts, and both decisions could stand. Indeed an employer probably need not even bring an 8(b)(4)(D) charge before suing under Sections 303(b) and 303(a)(4). Whether it may also obtain injunctive relief without the aid of the Labor Board is another matter. In describing the remedy in Section 303(a)(4) as a "different" remedy from that of Section 8(b)(4)(D), the Court said the former section "gives rise . . . to a judgment for damages." Section 303(a)(4) itself says nothing about remedies, and Section 303(a) provides specifically only that an injured party "shall recover the damages by him sustained and the cost of the suit."

ROCHIN V. CALIFORNIA

(January 2, 1952)

The Supreme Court was unanimous in reversing, on the basis of the Fourteenth Amendment, a state narcotics conviction founded on evidence that had been forcefully pumped out of the accused's stomach. In their opinions, however, its members refought an old battle.

Acting on information that Rochin was selling narcotics, Los Angeles deputy sheriffs entered an open door in his home, proceeded to his bedroom and forced its door. There they saw two capsules on a table standing near Rochin. When he saw the officers, Rochin popped the capsules into his mouth and, despite the officers' forceful efforts to get them out, succeeded in swallowing them. The officers took Rochin to a hospital, where a doctor at their direction forced an emetic solution into his stomach. Two capsules containing morphine came up. These were later used as the "chief evidence" in convicting him of the possession of morphine in violation of California law. Although all the judges of the California District Court of Appeal condemned the officers' conduct, a majority held the evidence admissible. 101 Cal. App. 2d 140, 225 P. 2d 1 (1950) The California Supreme Court refused to hear the case, two judges dissenting. 101 Cal. App. 2d 143, 225 P. 2d 913 (1951)

Mr. Justice Frankfurter, joined by five others, held the conviction re-

versible under the Fourteenth Amendment's Due Process Clause because the state officers' conduct was so brutal that it "shocks the conscience," and consequently should not be given "sanction" or afforded the "cloak of law":

> "Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation."

The Court's holding was based on "the general requirement that States in their prosecutions [must] respect certain decencies of civilized conduct." This was the principle, the Court said, that explained the coerced confession cases, which it cited as analogy .The exclusion of coerced confessions is not based simply on unreliability. "Even though statements contained" in coerced confessions "may be independently established as true," they are inadmissible because they "offend the community's sense of fair play and decency." Thus in the instant case it made no difference that the capsules were "real" evidence and lacked the taint of unreliability that may attach to coerced confessions.

In separate opinions Mr. Justice Black and Mr. Justice Douglas reached the same result, but by a strikingly different path. They argued, as they had in *Adamson v. California*, 322 U.S. 46, that the Fourteenth Amendment incorporates the Fifth in all its force, and thus for them the instant case was easy. The Fifth Amendment, they said, requires reversal because a person is compelled to be a witness against himself not only when he is forced to testify, but also when "incriminating evidence is forcibly taken from him by a contrivance of modern science."

Perhaps the most important problem raised by the majority opinion here is its relation to *Wolf v. Colorado*, 338 U.S. 25 (1949). In the instant case the Court reversed the conviction because "brutal conduct" should not be given "sanction" or be afforded the "cloak of law." In *Wolf* the Court affirmed a state court conviction based on evidence obtained as the result of a search and seizure forbidden by the Fourteenth Amendment. Thus the illegal conduct of state officers was given the "sanction" of admissibility and was afforded the "cloak of law." Under the *Wolf* doctrine, if the officers here had been able to reach the capsules before Rochin, no matter how unauthorized their entry, they could have introduced those capsules into evidence. Perhaps the evidence might have been admissible even if the officers had wrested the capsules out of Rochin's mouth in the struggle in his room. The Court did not find it necessary to distinguish the *Wolf* case in the instant opinion. It may be forced to explain the distinction in some future case where the illegal conduct of law enforcement officers is not so "brutal."

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OPINION, DECISION AND JUDGMENT!

The functions of concurring and dissenting opinions in courts of last resort, the subject of the Erskine M. Ross American Bar Association Essay Contest for 1952, is the *raison d'être* of this checklist.

It is interesting to recall a curiosity of American Judicial History; the first printed opinion published in the reports of the Supreme Court of the United States is a dissent (Mr. Justice Thomas Johnson in THE STATE OF GEORGIA VS BRAILSFORD, Et. Al., 2 Dallas 402, 1792). Johnson and Cushing "no", Iredell, Blair, Wilson, and Jay "yes" in concurrence. Opinion, Decision, and Judgment?

When the Ross Essays of 1952 have all been digested by the Awards Committee we are certain that there will be no dissent on the prize essay, though it may uphold or reject the theory of dissent, concurring dissents or ordinary concurring opinions with judgment.

> "Scintillate, scintillate, globule vivific,
> Fain would I fathom thy nature specific
> Loftily poised in ether capacious,
> Strongly resembling a gem carbonaceous."

when what they mean is

> "Twinkle, twinkle, little star,
> How I wonder what you are
> Up above the world so high,
> Like a diamond in the sky." *

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